

NORTH CAROLINA COURT OF APPEALS REPORTS

VOLUME 112

21 SEPTEMBER 1993

7 DECEMBER 1993

RALEIGH
1994

CITE THIS VOLUME
112 N.C. App.

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 2. Appointed and sworn in 12 May 1994.
 3. Appointed and sworn in 31 March 1994.

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1. Appointed and sworn in as Chief Judge 25 March 1994 to replace James E. Ragan III who went to superior court.
 2. Appointed and sworn in 6 May 1994.
 3. Appointed and sworn in 18 May 1994.
 4. Appointed and sworn in as superior court judge 12 May 1994.
 5. Resigned 31 January 1994.
 6. Appointed and sworn in 31 March 1994.

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CASES
ARGUED AND DETERMINED IN THE
COURT OF APPEALS
OF
NORTH CAROLINA
AT
RALEIGH

IN THE MATTER OF THE APPEAL OF THE ATLANTIC COAST CONFERENCE

No. 9210PTC527

(Filed 21 September 1993)

Taxation § 22.1 (NCI3d) — property tax exemption filed by ACC — statutory ownership requirement met — property used for purposes incident to operation of educational institution — property used exclusively for educational purposes — insufficiency of evidence to determine pecuniary profit

In a case arising out of a requested property tax exemption filed by the ACC on property located in Guilford County which the ACC used for the operation of its administrative offices, the Property Tax Commission did not err in finding that: (1) the ACC was not a separate entity from its constituent schools and that since each member was an educational institution, exempt from taxation, then the ownership requirement of N.C.G.S. § 105-278.4 was met; (2) the property was employed in the performance of those types of activities which are naturally and properly incident to the operation of an educational institution, the negotiation of television network contracts and management of broadcasts in collegiate athletics being necessarily incidental to the operation of educational institutions; and (3) the property was used wholly and exclusively for educational purposes as that term is used in the applicable statute,

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because the predominant purposes to which the property was dedicated were television contract negotiation and organization and administration of conference tournaments, both of which qualified as educational, as they sought to bring out the best in the individual athletes and had as one of their goals the development of the skills of the participants. However, the Commission erred in holding that none of the individual member institutions was organized for profit and that no person was entitled to receive any "pecuniary profit," except reasonable compensation, where the only finding to support this holding was that 8% of the ACC's revenues for the year were used for administrative expenses, while the remainder was distributed to the member institutions; there was no evidence in the record as to how the funds retained by the ACC were spent; the salaries and compensatory perks of all ACC commissioners and employees as well as the remaining administrative expenses were all relevant and needed to be known and determined to be reasonable; and it was not possible to determine if anyone or any entity such as a private organization received any "pecuniary profit" without this information.

Am Jur 2d, State and Local Taxation §§ 332, 362, 363, 365, 366, 374, 382, 383.

Judge MCCRODDEN dissenting.

Appeal by Guilford County from Final Decision of the Property Tax Commission sitting as the State Board of Equalization and Review entered 25 February 1992. Heard in the Court of Appeals 26 April 1993.

Jonathan V. Maxwell, County Attorney, and Joyce L. Terres, Assistant County Attorney, for Taxing Authority-Appellant.

Smith Helms Mulliss & Moore, by Bynum M. Hunter and Matthew W. Sawchak, for Atlantic Coast Conference-Appellee.

LEWIS, Judge.

The facts of this case arise out of a requested property tax exemption filed by the Atlantic Coast Conference (the "ACC") for 1989. The ACC owns property located at Landmark Center, Guilford County, which it uses for the operation of its administrative offices.

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The ACC estimated the value of its property to be \$974,518, consisting of \$188,518 for the real property, \$612,000 for improvements, and \$174,000 for personal property. On 13 April 1989 the ACC filed an Application for Property Tax Exemption pursuant to N.C.G.S. § 105-278.4 for the Landmark Center property. This request was denied by both the County Tax Department and the Board of Equalization and Review. The ACC then gave Notice of Appeal to the North Carolina Property Tax Commission ("Commission") which on 25 February 1992 entered its decision reversing the Board of Equalization, finding that the ACC did qualify for a property tax exemption under N.C.G.S. § 105-278.4. Guilford County has now appealed the decision of the Property Tax Commission to this Court.

A brief review of the ACC and its objectives is helpful in understanding the issues presented by this appeal. In 1989 the ACC was composed of eight member institutions: Clemson, Duke, Georgia Tech, Maryland, North Carolina, North Carolina State, Virginia and Wake Forest. Florida State joined the ACC in 1991. The ACC, with headquarters in Greensboro, administers approximately seventeen conference championships in various athletic competitions and negotiates television contracts for the broadcast of these championships and other athletic contests. The ACC derives income from the annual conference tournaments, regular season football and basketball television coverage and post-season coverage of both football and basketball games. Of the money derived from these various sources a percentage is retained to pay for the operation of the administrative offices as well as the salaries of the employees. The ACC has approximately fifteen employees including a Commissioner, six Assistant Commissioners, and various administrative personnel. The ACC is governed by a Board of Directors and an Executive Committee which is staffed by the employees of the ACC as well as faculty representatives from the member institutions. All money after administrative costs is divided among the member institutions under a plan approved by the Conference, with each institution receiving an equal share except when an institution participated in some event which would increase its share.

Guilford County contends that the ACC is not an educational institution itself, and that the Landmark Center is not actually used for an educational purpose. Thus, according to Guilford County the ACC does not qualify for an exemption under N.C.G.S. § 105-278.4 (1992) which provides:

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(a) Buildings, the land they actually occupy, and additional land reasonably necessary for the convenient use of any such building shall be exempted from taxation if:

(1) Owned by an educational institution (including a university, college, school, seminary, academy, industrial school, public library, museum, and similar institution);

(2) The owner is not organized or operated for profit and no officer, shareholder, member, or employee of the owner or any other person is entitled to receive pecuniary profit from the owner's operations except reasonable compensation for services;

(3) Of a kind commonly employed in the performance of those activities naturally and properly incident to the operation of an educational institution such as the owner; and

(4) Wholly and exclusively used for educational purposes by the owner or occupied gratuitously by another nonprofit educational institution (as defined herein) and wholly and exclusively used by the occupant for nonprofit educational purposes.

The wording and the construction of N.C.G.S. § 105-278.4 make it clear that there are four separate and distinct requirements which the ACC must meet in order to qualify for an educational exemption. As a general rule the burden is on the taxpayer to prove entitlement to an exemption. *Sir Walter Lodge No. 411 v. Swain*, 217 N.C. 632, 9 S.E.2d 365 (1940) ("[t]axation is the rule; exemption the exception."). This burden is substantial and often difficult to meet because all property is subject to taxation unless exempted by a statute of statewide origin. N.C.G.S. § 105-274. In addition, statutes exempting property are construed so that everything is excluded except that which clearly comes within the scope of the language used. *Wake County v. Ingle*, 273 N.C. 343, 160 S.E.2d 62 (1968).

The extent of our review of the Commission's decision is governed by N.C.G.S. § 105-345.2 which provides for a review of the whole record. *In re Appeal of Perry-Griffin Foundation*, 108 N.C. App. 383, 424 S.E.2d 212, *disc. rev. denied*, 333 N.C. 538, 429 S.E.2d 561 (1993). "In reviewing whether the whole record fully supports the Commission's decision, this Court must evaluate whether the Commission's judgment, as between two reasonably conflicting views,

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is supported by substantial evidence, and if substantial evidence is found, this Court is not permitted to overturn the Tax Commission's decision." *Id.* at 394, 424 S.E.2d at 218 (citations omitted). In order to determine whether substantial evidence was present in the record, we have examined the elements of N.C.G.S. § 105-278.4 in light of the Commission's conclusions of law.

A.

Owned by an educational institution.

In its first two conclusions of law, the Commission held that the ACC was not a separate entity from its constituent schools and that since each member was an educational institution, exempt from taxation, then the ownership requirement was met. In support of this conclusion, the Commission found that the ACC was an unincorporated association consisting of eight member institutions.

It is uncontroverted that the ACC is an unincorporated association, and property titled in the name of an unincorporated association belongs to its members. *Venus Lodge No. 62 v. Acme Benevolent Ass'n*, 231 N.C. 522, 58 S.E.2d 109 (1950). As a result we agree with the Commission's conclusion that the Landmark Center property is owned by the individual member institutions.

Guilford County contends that the ACC is the actual owner of the property and not the individual members. In support of this argument the County cites the ACC's Constitution which provides that a member who is expelled from the ACC shall no longer maintain any interest in the property of the Conference. Guilford County's argument disregards the nature of unincorporated associations and the fact that title to the Landmark Center is held in the name of "Atlantic Coast Conference unincorporated association." The fact that the true owners of the property are the individual member institutions is shown by the fact that upon dissolution of the Conference each member institution would receive an equal share. The mere fact that the member institutions have agreed in the ACC's Bylaws and Constitution to be subject to disciplinary actions, including expulsion and other penalties, does not negate their ownership interest. We find that substantial evidence exists in the record to support the Commission's conclusions on the issue of ownership.

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B.

Not for Profit.

In its third conclusion of law the Commission held that none of the individual member institutions was organized for profit and that no person was entitled to receive any "pecuniary profit," except reasonable compensation. The Property Tax Commission's findings of fact in support of this conclusion are not voluminous. In fact, the only finding made by the Commission relating to this element was that 8% of the ACC's revenues during 1989 were used for administrative expenses, while the remainder was distributed to the member institutions. As further evidence of its nonprofit nature, the ACC cites its Bylaws which provide that the purpose of the Conference is

to promote intercollegiate athletics, to keep it in proper bounds by making it an incidental and not the principal feature of college and university life, and to regulate it by wise and prudent measures in order that it may improve the physical condition, strengthen the moral fibre of students, and form a constituent part of that education for which universities and colleges were established and are maintained.

However, this does not conclude our examination into the second requirement of section 105-278.4(a). According to part (2) of 105-278.4(a), no employee or shareholder of an educational institution may receive any "pecuniary profit" other than reasonable compensation for services. Our review of this issue is made difficult because the term "pecuniary profit" is not defined in the statute. At oral argument counsel for the ACC offered the definition that "pecuniary profit" meant the diversion of income to someone who was not entitled to claim an exemption.

Our review of this issue is further frustrated by the lack of evidence in the record indicating how the funds retained by the ACC were spent. Whenever Guilford County requested pertinent information, its requests were frustrated by protective orders and other objections. The only evidence in the record as to how the ACC spent the 8% concerns the salaries of its commissioners. During the hearing before the Property Tax Commission, Assistant Commissioner Bradley Faircloth was asked about the various salaries of the commissioners. The ACC objected to this inquiry on the basis that it was irrelevant and the objection was sustained. This

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was error. "Reasonable compensation" is allowed under the exemption statute but in order to ascertain its reasonableness, it must be known. All compensation, be it monetary or as "perks," must be known. Guilford County was allowed to make an offer of proof that the Commissioner makes approximately \$180,000 and has the use of a car, and that the six assistant commissioners make between \$45,000 and \$75,000 each. We do not find these salaries to be unreasonable given the responsibilities of the commissioners. However, the salaries and compensatory perks of the other employees as well as the remaining administrative expenses are all relevant and must be known and determined to be reasonable as well. Although Mr. Faircloth testified that the salaries of the commissioners were set and that no bonuses or incentives were received based on how much income the ACC generated, we still have no evidence in the record as to how the balance of the 8% allocated to administrative expenses was spent. It is not possible to determine if anyone or any entity such as a private organization received any "pecuniary profit" without this information. It is necessary to know how the funds were spent if we are to determine the issue of "pecuniary profit."

Before we leave this issue, we feel compelled to address the reluctance of the ACC and the constituent universities to disclose pertinent financial information. The County was unable to obtain this information directly from the ACC so on 2 July 1990 the County attempted to obtain copies of the ACC's annual audit and balance sheets from the University of North Carolina and North Carolina State University by virtue of Chapter 132 of the North Carolina General Statutes, which provides for public disclosure. Both are public institutions and both are members of the ACC. The record indicates a response to the County's inquiry only from John Swofford, the athletic director at the University of North Carolina. Mr. Swofford replied:

I write in response to your letter of July 2 to the University Registrar at the University of North Carolina at Chapel Hill requesting financial records on the Atlantic Coast Conference.

I write to let you know that we do not have in our possession the annual audit or balance sheets from the ACC for the past two years. This information is not sent to the Conference member schools, and would have to be obtained from the Atlantic Coast Conference office.

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We find this response to be less than forthcoming, especially when the 1991 ACC Manual indicates that Mr. Swofford was the chairman of the ACC's Committee on Television. Considering that his school was entitled to one-eighth of the net revenues of the ACC it would seem at least desirable, if not necessary, to have the audit, balance sheets or some equivalent information in order to competently do his job. If technically he did not have the documents in his possession, he certainly had the information.

We hold that the balance sheets and audits are relevant and discoverable. Without knowing how \$1.9 to \$2.2 million was spent, it cannot be ascertained whether or not any person or entity received "pecuniary profit" or if anyone received unreasonable compensation.

Since we specifically disavow the percentage approach urged by the ACC, the financial information sought by Guilford County was relevant and necessary. During the hearing before the Commission and during oral argument before this Court, the ACC stated that the disclosure of specific financial information was not necessary and that the real focus should be on whether or not 8% of \$24 to \$28 million (\$1.9 to \$2.2 million) is reasonable for the administration of the Conference headquarters. We do not believe the legislature intended for a percentage method to be applied. The statute does not state that "8% or less of the income may go for pecuniary profit" before property loses its exemption. No pecuniary profit is permitted if property is exempted. We remand on this issue.

C.

Incident to the operation of an educational institution.

The third provision of section 105-278.4(a) is that the property must be employed in the performance of those types of activities that are naturally and properly incident to the operation of an educational institution. It is undisputed that athletic activities are a natural part of the education process whether they be inter-collegiate or intramural. See *In re Forsyth County Tax Supervisor*, 51 N.C. App. 516, 277 S.E.2d 91, *disc. rev. denied*, 303 N.C. 544, 281 S.E.2d 391 (1981). In *Forsyth County* this Court held that a portion of a parking lot reserved for football games qualified as being used wholly and exclusively for educational purposes. *Id.* Guilford County has conceded the importance of athletics in education, but argues that the facts of this case are distinguishable

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from those in *Forsyth County* because the ACC's headquarters are used for contract negotiation and management and not for athletic events. We disagree.

As stated in *National Collegiate Realty Corp. v. Board of County Commissioners*, 690 P.2d 1366, 1371 (Kan. 1984), "[t]he fact that the subject property is utilized for administration rather than programs directly and immediately involved with the education of students is not, in itself, a bar to the requested exemption." In today's climate of national broadcasting and ESPN, mega-million dollar contracts for basketball and football coverage are commonplace. Educational institutions must necessarily engage in the marketing of their athletic teams to be able to afford to maintain and improve the facilities and equipment of their athletic teams. Had the member institutions of the ACC not formed this alliance to strengthen their collective bargaining position, then each individual institution would have been required to conduct its own contract negotiations with the major networks. Guilford County claims that if these activities were conducted on the individual campuses then the institutions would have crossed the line from educational to commercial. In that case the County claims that a percentage of the buildings where these activities took place would be subject to ad valorem taxes. We do not believe that the legislature intended such an awkward result when it drafted section 105-278.4. We hold that in collegiate athletics, the negotiation of network contracts and management of broadcasts are as necessarily incidental to the operation of educational institutions as is the maintenance of a parking lot, and it matters not whether these activities take place at the Landmark Center in Greensboro, in Duke Chapel, in Watauga Hall, at the Old Well or in the Worrell Professional Center.

D.

Wholly and exclusively used for educational purposes.

The Property Tax Commission also concluded that the property at the Landmark Center was used wholly and exclusively for educational purposes as that term is used in N.C.G.S. § 105-278.4. Section (f) of 105-278.4 defines an educational purpose as one which "has as its objective the education or instruction of human beings, it comprehends the transmission of information and the training or development of knowledge or skills of individual persons." In deciding whether or not something qualifies as an educational purpose, our courts have consistently held "that it is not the nature

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or the character of the owning entity which ultimately determines whether property shall be exempt from taxation, but it is the use to which the property is dedicated which controls." *In re Forsyth County Tax Supervisor*, 51 N.C. App. 516, 520, 277 S.E.2d 91, 94, *disc. rev. denied*, 303 N.C. 544, 281 S.E.2d 391 (1981).

Since it is the use to which the property is dedicated which controls, we have undertaken an examination of the ways in which the ACC uses the Landmark Center to determine if these uses have as their objective the instruction of students and the development of skills. After reviewing the record, we find that there are two predominant purposes to which the ACC's property is dedicated: 1) television contract negotiation, and 2) organization and administration of Conference tournaments. Both of these activities qualify as "educational." These Conference tournaments bring out the best in the individual athletes as they seek individual honors and victories for their schools. There can be no doubt that the sponsorship of these tournaments has as one of its goals the development of the skills of the participants.

The role of the ACC is to promote college athletics, particularly ACC college athletics. Part of this role involves negotiating television contracts, following NCAA rules and regulations regarding eligibility and in some cases even establishing more stringent rules concerning academic eligibility. The Supreme Court of Kansas held that these and similar activities conducted by the NCAA helped to endow college athletics with a rich academic tradition which differentiated them from professional sports. *National Collegiate Realty Corp. v. Board of County Comm'rs*, 690 P.2d 1366, 1373 (Kan. 1984). The Supreme Court of Kansas went on to conclude that the NCAA headquarters qualified for an exemption because it was used exclusively for educational purposes. We find the opinion of the Kansas Court to be persuasive, not only because of the similarities in the functions of the ACC and the NCAA, but also because the Kansas property exemption statute has an exclusive use provision like our own in N.C.G.S. § 105-278.4(a)(4).

In its brief and at oral argument, Guilford County relied heavily on *In re North Carolina Forestry Association*, 296 N.C. 330, 250 S.E.2d 236 (1979). There, our Supreme Court addressed the situation where a nonprofit foundation owned a forest for the purposes of promoting improved forestry methods, and for the production and preservation of timber. Another purpose of the foundation

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was the promotion of forestry research and education at North Carolina State University. In determining whether the forest was held exclusively for an exempt purpose, the Supreme Court held that the exclusive use element was not met because a paper company actually occupied and used the forest for commercial purposes, making the educational use merely incidental. We feel that *Forestry Association* is distinguishable from the case at bar because the ACC is an unincorporated association made up of educational institutions and not a commercial enterprise as was the paper company. In addition, the use of the Landmark Center is not commercial in nature but instead, as we discussed in section C, is properly incidental to the activities of an educational institution. We find that substantial evidence exists in the record to support the Property Tax Commission's conclusion that the Landmark Center was used wholly and exclusively for educational purposes.

We are not charged with determining the validity of the concept of the "student athlete" nor its application in the ACC. Nor can we challenge the oft heard complaint that college sports are "big business." We must answer this issue as to whether or not the property of the ACC at the Landmark Center is exempt under the law. We note Guilford County's argument that the ACC generates enormous reserve. We find nothing in the law to indicate that the scope of monetary success has any bearing on this case or any exception. We find no merit in that contention.

Remanded for further hearings before the Property Tax Commission as to the disposition of the balance of the \$1.9 to \$2.2 million, i.e. the 8%, and whether pecuniary profit was made or unreasonable compensation paid to any employee or associated entity.

Remanded.

Judge COZORT concurs.

Judge MCCRODDEN dissents.

Judge MCCRODDEN dissenting.

I respectfully dissent from the majority's conclusion that the property owned by the Atlantic Coast Conference (ACC), if its expenditure of administrative funds does not violate N.C. Gen.

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Stat. § 105-278.4(a)(2) (1992), is tax exempt. Before turning to my analysis of the governing statute, I would like to join the majority in its chastising of a representative of the University of North Carolina who evaded a request by Guilford County for ACC financial data pertinent to its decision in this matter. Both the University of North Carolina and North Carolina State University, members of the ACC, are public institutions and are subject to the Public Records Law, N.C. Gen. Stat. §§ 132-1 to -9 (1991). They may not avoid their responsibilities in disclosing records which are deemed public under the law or, for that matter, to accomplish indirectly any other prohibited act by virtue of their membership in the ACC. The University representative's actions were, at best, disappointing.

I reject the majority's conclusions (1) that the member institutions own the subject property; (2) that the ACC is not operated for profit; (3) that the activities of the ACC are "[o]f a kind commonly employed in the performance of those activities naturally and properly incident to the operation of an educational institution such as the owner;" and (4) that the owner uses the property wholly and exclusively for educational purposes.

First, as an unincorporated association, the ACC may and does hold the Landmark property in its own name. N.C. Gen. Stat. § 39-24 (1984) states:

Voluntary organizations and associations of individuals organized for charitable, fraternal, religious, social or patriotic purposes, when organized for the purposes which are not prohibited by law, are hereby authorized and empowered to acquire real estate and to hold the same in their common or corporate names and may sue and be sued in their common or corporate names concerning real estate so held: Provided, that voluntary organizations and associations of individuals, within the meaning of this Article, shall not include associations, partnerships or copartnerships which are organized to engage in any business, trade, or profession.

The ACC is a voluntary organization of member institutions united to maximize the proceeds they can derive from athletic events and can apply, at least in part, to educational goals. The Supreme Court has defined charitable institutions to include educational institutions. *See, e.g., Reynolds Foundation v. Trustees of Wake Forest College*, 227 N.C. 500, 42 S.E.2d 910 (1947).

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The statute does not define the word *individual*. I do not, however, believe that the use of this term excludes the member institutions of the ACC. Indeed, *Venus Lodge No. 62 v. Acme Benevolent Ass'n.*, 231 N.C. 522, 58 S.E.2d 109 (1950), the case cited by the ACC and relied upon by the majority for the proposition that property titled in the name of an unincorporated association belongs to its members, defined an unincorporated association as "merely a body of *individuals* acting together, without a corporate charter, but upon the methods and forms used by incorporated bodies, for the prosecution of some common enterprise." *Id.* at 526, 58 S.E.2d at 112 (emphasis added).

Venus, which repeated the common law principle that an unincorporated association "is not an entity, and has no existence independent of its members . . . [and] has no capacity at common law to contract; or to take, hold, or transfer property; or to sue or be sued," involved a transfer of property occurring in 1937, two years before the enactment of N.C.G.S. § 39-24. *Id.* (citations omitted). It is not, therefore, dispositive of the ownership question. For purposes of real property, N.C.G.S. § 39-24 establishes an unincorporated association as an entity in and of itself.

I would further point out that *Venus* is distinguishable on other grounds as well. *Venus* involved the transfer of property to which *all* members of the unincorporated association agreed. In the case under review, since a majority of member institutions could oust other members, that same majority could, in essence, transfer the subject property. This fact belies the concept that all member institutions own the property and underscores the fact that the ACC is a separate entity possessing some powers which supersede those of its members. Since the educational institutions do not own the subject property, Guilford County may properly subject it to taxation.

Second, I also disagree with the majority in its application of that part of N.C.G.S. § 105-278.4(a)(2) which requires that the owner of exempt property not be organized or operated for profit. *Black's Law Dictionary* defines the word *profit* to be "the gross proceeds of a business transaction, less the costs of the transaction Gain realized from business or investment over and above expenditures." *Black's Law Dictionary* 1211 (6th ed. 1991). There is no question but that the ACC operates for profit. Indeed, one of its purposes is to pool its resources so as to maximize

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profits. The fact that it returns part of that profit to the member institutions, and they in turn apply a portion to non-athletic pursuits, does not, in light of *Rockingham County v. Elon College*, alter this:

The fact that a commercial enterprise devotes its entire profits to a charitable or other laudable purpose does not change the character of its business nor the purpose for which it is held. It is still a commercial enterprise, and is held as such. . . . So, when an educational institution sees fit to engage in an outside competitive business for the purpose of increasing its revenues, the trade part of its business falls into the category of a commercial undertaking.

219 N.C. 342, 346-47, 13 S.E.2d 618, 621 (1941). As a profit-making enterprise, the ACC is not exempt from paying property taxes.

Third, I also reject the majority's determination that the property is "[o]f a kind commonly employed in the performance of those activities naturally and properly incident to the operation of an educational institution such as the owner." N.C.G.S. § 105-278.4(a)(3). In its broadest sense, education comprehends the whole course of training—moral, mental and physical, 71 Am. Jur. 2d *State and Local Taxation* § 382 (1973), and, to be sure, athletics are geared toward development of a student's physical well-being. To extend this truism to encompass the ACC and "today's climate of national broadcasting and ESPN, mega-million dollar contracts for basketball and football coverage" is a perversion of education in the classic sense. The ACC's quest for exemption from property tax fails on this requirement as well.

Finally and logically following from the foregoing analysis, the ACC's activities on the Landmark Center property are not wholly and exclusively for educational purposes. In this case there can be little doubt that the marketing of broadcast rights for sporting events is a commercial enterprise. Collegiate sports programming competes directly with commercially produced entertainment programming. It matters not that the proceeds are eventually dedicated, in part, to the educational purpose of athletics at the schools. See *Rockingham County v. Elon College*, 219 N.C. 342, 13 S.E.2d 618.

In light of the ACC's failure to meet any of the requirements to exempt its property from taxation, I would vote to reverse the decision of the North Carolina Property Tax Commission and to hold the ACC accountable for taxes on the Landmark Center.

BROWN v. BROWN

[112 N.C. App. 15 (1993)]

JOANN BROWN v. D. T. BROWN, JR., ORIGINAL DEFENDANT v. PAUL G.
BROWN, ADDITIONAL DEFENDANT

No. 9224DC669

(Filed 21 September 1993)

**Divorce and Separation § 112 (NCI4th)— interim distribution of
marital property—lump sum cash award—no authority of court
to order**

In N.C.G.S. § 50-20(i1), which allows for an interim distribution of marital property, language providing for the transfer of “the use and possession” of a marital asset does not grant the trial court the authority to order the spouse in control of the marital assets to pay to the other spouse a lump sum cash award where such cash is not an existing marital asset.

Am Jur 2d, Divorce and Separation §§ 950 et seq.

Judge GREENE dissenting.

Appeal by defendants from Order entered 2 March 1992 by Judge Alexander Lyerly in Watauga County District Court. Heard in the Court of Appeals 25 May 1993.

Petree Stockton, by Kevin L. Miller and W. Mark Conger, and McElwee, McElwee & Ward, by William H. McElwee, III, for the plaintiff-appellee.

Norris & Peterson, P.A., by Allen J. Peterson, and Hemphill & Gavenus, by Kathryn Hemphill, for defendants-appellants.

WYNN, Judge.

The plaintiff, JoAnn Brown, and the original defendant, D.T. Brown, Jr., were married on 30 July 1949 and separated on 26 July 1981. JoAnn Brown filed an action against D.T. Brown, Jr. on 13 January 1982 seeking alimony, possession of the marital home, and equitable distribution. The parties entered into a Consent Judgment on 25 February 1982, pursuant to which the plaintiff was awarded \$1200/month temporary alimony and a writ of possession of the marital home. The Consent Judgment also provided that the defendant was to continue paying the premiums on the plaintiff's health and hospitalization insurance pending a final resolu-

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tion, and that the defendant was entitled to have delivered to him certain personal property from the marital home.

Thereafter, on 26 May 1983, the trial court entered an Order allowing the plaintiff to amend her complaint to include as additional defendants Paul Brown, with whom D.T. Brown, Jr. was an equal partner in Brown Brothers Construction Company, and Paul's former wife, Gladys Brown. The plaintiff claimed an equitable interest in property titled in the name of Paul Brown, Paul Brown and Gladys Brown, or Paul Brown and third parties, on the theory that such property had been purchased with funds from the Brown Brothers Construction Company, the most substantial marital asset. Subsequently, on 10 August 1984, Paul Brown was granted partial summary judgment and the trial court ordered that all of plaintiff's equitable claims with regard "to all properties titled in the name of Paul G. Brown, Gladys Brown and/or Paul G. Brown and third parties" be dismissed with prejudice. By that same order, the trial court denied summary judgment as to all property titled in the name of Paul Brown and D.T. Brown, Jr. or Brown Brothers Construction Company.

Pursuant to Rule 53(a)(2)(b) of the North Carolina Rules of Civil Procedure, the trial court, on 12 December 1988, appointed a referee to hear from the parties and identify the marital assets of JoAnn Brown and D.T. Brown, Jr., determine their value as of the date of separation, and suggest an equitable distribution of the marital assets pursuant to N.C.G.S. § 50-20. The referee submitted a preliminary report to the court on 7 January 1991, to which the plaintiff and defendant filed objections and submitted additional information for consideration. Thereafter, the referee filed a supplemental report on 21 January 1992 which amended the original report based on the objections and additional information received from the parties.

On 22 October 1991, plaintiff filed a motion for an interim distribution of marital assets pursuant to N.C.G.S. § 50-20(i1), enacted effective 1 October 1991. The trial court received memoranda from the parties regarding the motion and, on 2 March 1992, ordered D.T. Brown, Jr. to pay to plaintiff a sum of \$400,000 cash and granted plaintiff a lien in that amount against all property titled in the name of D.T. Brown, Jr. The court further ordered that, if D.T. Brown, Jr. failed to pay the award, Brown Brothers Construction Company would be charged with making the payment

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and plaintiff would be entitled to foreclose on the company. Additionally, plaintiff's counsel were named as receivers to sell the assets of the Brown Brothers Construction Company in the event that the award was not paid, one-half the proceeds to be paid to JoAnn Brown and one-half to Paul Brown. From that Order the defendants appeal.

By their first assignment of error, the defendants argue that the interim award in the present case was made in contravention of N.C.G.S. § 50-20(i1). We agree.

N.C.G.S. § 50-20(i1) was enacted effective 1 October 1991 and provides for an interim distribution of marital property as follows:

After an action for equitable distribution has been filed the Court may, for just cause, order the spouse in control of marital assets to transfer the use and possession of some or all of those assets to the other spouse provided that any and all assets so transferred shall be subject to a full accounting when the property is ultimately allocated in an equitable distribution judgment. Any property transfer made pursuant to this subsection shall be made without prejudice to the rights of either spouse to claim a contrary classification, value, or distribution in the final equitable distribution trial.

We must determine whether the language in this section providing for the transfer of "the use and possession" of a marital asset grants the trial court the authority to order the spouse in control of the marital assets to pay to the other spouse a lump sum cash award where such cash is not an existing marital asset. We hold that it does not.

In determining the meaning of a statute, it is useful to look to its "purpose and spirit . . . and what it sought to accomplish," as well as to the "history and circumstances surrounding the legislation and the reason for its enactment." *Black v. Littlejohn*, 312 N.C. 626, 630, 325 S.E.2d 469, 473 (1985).

Prior to the enactment of § 50-20(i1), the trial court had no authority to make an interim award of marital assets. Consequently, pending a final outcome of the equitable distribution proceeding, one spouse could retain control of all the cash and income-generating assets belonging to the marital estate, receiving the benefit of those assets, while the other retained nothing and derived no benefit

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from the marital estate. This resulted in hardship to the spouse who did not control the assets. It also gave the controlling spouse an incentive to delay the equitable distribution proceedings. Under § 50-20(i1), the trial court is permitted to make an interim transfer of assets, so that the necessary delay pending the equitable distribution proceeding will not prejudice the party who is not in control of cash or income-producing assets.

We hold that the scope of § 50-20(i1) is plainly limited to in kind asset transfers. It does not allow the court to order a cash payment, when cash is not an identifiable marital asset, nor to order the spouse who has control over a marital asset of substantial value to pay a lump sum cash amount to the other spouse as compensation for not having control of the asset.

In the case at bar, the trial court exceeded the scope of § 50-20(i1). Although there was no evidence that \$400,000 cash exists as a marital asset, the court ordered a \$400,000 payment. To comply with this order, the defendant would either have to tap non-marital assets or liquidate his share of Brown Brothers Construction, both of which exceed the scope of relief under § 50-20(i1). Section 50-20(i1) was not intended to make the transferring spouse transfer something he or she does not possess.

It is plain on the face of the statute that the provision for transfer of "the use and possession" of a marital asset contemplates the transfer of an asset in kind. Transferring the "use and possession" means that the spouse receiving the transfer is entitled to hold the asset pending a final equitable distribution award and use it as it was meant to be used. As such, a spouse might be required to transfer the use and possession of the marital home so that the other spouse can live there; a spouse in control of rental property belonging to the marital estate may be required to transfer it so the other spouse can benefit from the rental income generated by the property; or a spouse may be required to transfer a marital bank account so the other spouse has access to cash.

Because it authorizes only an interim transfer of assets pending the equitable distribution, the statute is designed not to prejudice either party's position at the final equitable distribution. The statute provides that "any and all assets so transferred shall be subject to a full accounting when the property is ultimately allocated in an equitable distribution judgment," and "[a]ny property transfer made pursuant to this subsection shall be made without prejudice

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to the rights of either spouse to claim a contrary classification, value, or distribution in the final equitable distribution trial." N.C.G.S. § 50-20(i1).

An order requiring a transferor spouse to break up assets so that cash can be transferred would cause just the prejudice this subsection seeks to avoid. Here, defendant faces the sale of the family business to generate the lump sum cash payment. Since the business is the parties' primary source of income, such sale would certainly result in long-term financial prejudice to both parties.

Defining asset transfers as in kind transfers is the only understanding that makes sense in the context of the rest of the statute. North Carolina's law on the distribution of marital property upon divorce is strictly governed by statute. All equitable distributions and distributive awards are to be made in close accord with § 50-20. Accordingly, in discerning the meaning of this new provision, we must take the statute as a whole into account.

An important feature of the statute is its presumption that equitable distributions are to be in kind. Under § 50-20, the trial court is to classify property as either marital or separate, value it, and distribute it between the parties. *Cable v. Cable*, 76 N.C. App. 134, 331 S.E.2d 765, *disc. rev. denied*, 315 N.C. 182, 337 S.E.2d 856 (1985); *Beightol v. Beightol*, 90 N.C. App. 58, 367 S.E.2d 347, *disc. rev. denied*, 323 N.C. 171, 373 S.E.2d 104 (1988). Only upon a finding by the court that "an equitable distribution of all or portions of the marital property in kind would be impractical," can the presumption of an in kind distribution be overcome and a distributive award permitted. N.C.G.S. § 50-20(e). The distributive award is designed as a secondary remedy to the equitable distribution, to "facilitate, effectuate or supplement a distribution of marital property." N.C.G.S. § 50-20(e).

There is a very good reason why distributive awards under § 50-20(e) are not contemplated under § 50-20(i1). The interim award is precisely that: an award designed to give a party interim relief in anticipation of a final resolution of the estate. The interim award is useful to the party without assets precisely because it can be awarded quickly. It is not slowed by the extensive findings and hearings required for the final distribution. But by the same token, because such findings have not yet been made, it is impossible for the court making the interim award to meet the § 50-20(e)

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requirement that it determine the impracticability of an equitable distribution before ordering a distributive award.

Not allowing a cash distributive award prior to a final classification and valuing of the marital estate is also consistent with the statute's goal of keeping the marital estate as intact as possible until the final equitable distribution order is entered. *See* N.C.G.S. § 50-20(i) (providing that the trial court may enter injunctive relief or require a bond or other assurance to avoid the disappearance, waste, or conversion of marital property); *see also* N.C.G.S. § 50-20(c)(11a) (party's waste of marital property is a distributional factor as is the effort to maintain or preserve such property).

Our interpretation is further aided by basic principles of statutory construction.

It is a well-established principle of statutory construction that when a statute is amended, the existing law is not presumed to be changed further than that expressly declared in the amendment. 82 C.J.S. *Statutes* § 384 (1953). Section 50-20(i1) only provided for asset transfers. It did not mention lump sum cash payments or distributive awards. Therefore, such remedies are not options under § 50-20(i1). A statute directing performance in a particular manner by implication forbids performance in any other manner. 82 C.J.S. *Statutes* § 327 (1953).

The fact that the drafters of § 50-20(i1) used conspicuously different language from that used in § 50-20(e) further shows that "asset transfers" were not intended to include distributive awards. While § 50-20(e) provides for "distribution of marital property" and "distributive awards," § 50-20(i1) provides that the court may order a spouse to "*transfer the use and possession* of some or all of (the marital) assets." (Emphasis added). It is a tenet of statutory construction that "a change in phraseology when dealing with a subject raises a presumption of a change in meaning." *Latham v. Latham*, 178 N.C. 12, 100 S.E. 131 (1919). If the legislature had wanted to allow the trial court to make interim lump sum cash awards pending the final outcome of an equitable distribution action, it could have expressly written § 50-20(i1) to include "distribution of marital property" or "a distributive award" as well as or instead of "transfer the use and possession of . . . assets" language. The fact that the legislature had the option to include this language, but chose not to, is presumptive evidence that it intended that the provision not encompass such options.

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Another well-established principle of statutory construction is that a provision will not be read in a way that renders another provision of the same statute meaningless. *Porsh Builders, Inc. v. City of Winston-Salem*, 302 N.C. 550, 276 S.E.2d 443 (1981), (statute must be construed so that none of its provisions shall be rendered useless or redundant); *State v. Tew*, 326 N.C. 732, 392 S.E.2d 603 (1990); *Sutton v. Aetna Cas. & Sur. Co.*, 325 N.C. 259, 382 S.E.2d 759, *reh'g denied*, 325 N.C. 437, 384 S.E.2d 546 (1989). However, that is just what would occur if courts were allowed to order equitable and lump sum distributions through § 50-20(i1). There would be no need to use the final equitable distribution proceedings to divide and allocate spouses' assets, because division and distribution would have occurred at the interim stage. Thus, §§ 50-20(a) and (d), under which courts presently classify, value, and distribute property, would be unnecessary. Clearly, the legislature did not intend such a result.

We stress that adequate relief for this plaintiff is available within the scope of the statute. If the trial court wants JoAnn Brown to benefit from the principal marital asset, Brown Brothers Construction, it can order the transfer to her of some or all of defendant's one-half interest in the company. As possessor of that interest, she can then use it to realize a share of the company's profits, as defendant would otherwise do, until a final equitable distribution award can be entered. Such a transfer would preserve the marital estate and not involve a potential sale of the family business, a sale which as previously indicated would certainly result in long-term financial prejudice for all parties involved, which prejudice § 50-20(i1) specifically seeks to avoid.

By their second and third assignments of error, the defendants contend that the trial court erred in not considering all of the provisions of § 50-20 in making the award and that the trial court erred in making the award prior to ruling on the objections and exceptions filed by the parties with respect to the referee's report. Because we hold that the trial court erred in awarding the lump sum cash award, it is unnecessary for us to decide the merits of these and the other remaining assignment of error. However, because the second and third assignments relate to the application of § 50-20(i1), we find it necessary to comment briefly. Section 50-20(i1) provides for an interim transfer to be ordered prior to a final decision in the equitable distribution award. If the trial court considers all provisions of § 50-20 and rules on all the ob-

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jections and exceptions to the referee's report, the end result would constitute a final order of equitable distribution. Requiring such considerations, then, would render the interim transfer provision inconsequential, which we do not find to be the intention of the legislature.

For the foregoing reasons, the decision of the trial court is

Vacated.

Judge JOHNSON concurs.

Judge GREENE dissents in a separate opinion.

Judge GREENE dissenting.

I disagree, for the reasons given below in Section I, with the majority that the interim cash award of \$400,000 to plaintiff is "in contravention" of N.C. Gen. Stat. § 50-20(i1). I agree, for the reasons given below in Section II, that it was not necessary for the trial court to consider "all of the provisions of [s]ection 50-20 in making the award" and to rule "on the objections and exceptions filed by the parties with respect to the referee's report." I do note, however, that because the award is not a final adjudication of the merits of the case and because any interim award is subject to a full accounting upon entry of the final equitable distribution judgment, the appeal is interlocutory, does not affect a substantial right, and would ordinarily be dismissed. *See Baker v. Rushing*, 104 N.C. App. 240, 245, 409 S.E.2d 108, 111 (1991). Because, however, of the important issues presented relating to the proper application of N.C. Gen. Stat. § 50-20(i1), I would treat this appeal as a petition for writ of certiorari and grant the writ. N.C.G.S. § 7A-32(c) (1989); *see Jerson v. Jerson*, 68 N.C. App. 738, 740, 315 S.E.2d 522, 523 (1984).

I

The basic issue presented is whether N.C. Gen. Stat. § 50-20(i1) permits a trial judge to make an interim distributive award.

Although Section 50-20(i1) is silent on the issue of distributive awards, the intent of the legislature must be determined from an examination of the entire statute of which Section 50-20(i1) is a part. *See Utilities Commission v. Duke Power Co.*, 305 N.C.

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1, 13, 287 S.E.2d 786, 793 (1982) ("All parts of the [same] act should be considered, and construed together."). Section 50-20(e), a portion of the statute of which Section 50-20(i1) is a part, permits distributive awards when "equitable distribution of all or portions of the marital property in kind would be impractical." N.C.G.S. § 50-20(e) (Supp. 1992). Although Section 50-20(e) has generally been used in the context of final awards, there is no language in the section that would prohibit its use in the context of interim awards. Furthermore, because distributive awards in the context of Section 50-20(i1) can assist the trial court in achieving "equity between the parties" and "facilitate, effectuate or supplement" an interim transfer of marital assets, they are sanctioned by Section 50-20(e). *See* N.C.G.S. § 50-20(e).

As with all equitable distribution judgments, an interim distributive award must include written findings of fact adequate to support the conclusions of law. N.C.G.S. § 50-20(j) (Supp. 1992); *Armstrong v. Armstrong*, 322 N.C. 396, 403, 368 S.E.2d 595, 599 (1988). Accordingly, upon a finding that there exists "just cause"¹ for an interim order to transfer "the use and possession" of marital assets and upon the additional finding that an interim transfer of marital assets in kind is impractical, the trial court may enter an interim distributive award.

In this case, the trial court found as a fact that there was "just cause" for the interim award and there is evidence in this record to support that finding. Although not defined by the statute, the ordinary meaning of the term includes causes that are "fair and honest," "based on reasonable grounds," *Black's Law Dictionary* 1001 (4th ed. 1968), "properly due or merited," and "based on fact or sound reason." *American Heritage Dictionary* 694 (2d ed. 1985). *See Reed v. Byrd*, 41 N.C. App. 625, 628, 255 S.E.2d 606, 608 (1979) (words not defined by statute must be given ordinary meaning). This record reveals that the plaintiff has not had the money to fund this lawsuit which has extended over a decade; plaintiff has worked minimum-wage jobs; she has been deprived of a car for the last five years; she has gone from time to time without heat in the house; she has had access only to a minuscule part of the marital estate; and defendant D.T. Brown, Jr. has had access

1. Because the determination of "just cause" is reached by natural reasoning, not by application of fixed rules of law, it is an ultimate finding of fact, not a conclusion of law. *See Quick v. Quick*, 305 N.C. 446, 452, 290 S.E.2d 653, 658 (1982).

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to and control of virtually all of the income-producing marital assets since their separation in 1981.

The trial court was also required, as a prerequisite to an interim distributive award, to include in its order a finding of fact that an in kind transfer of marital assets was impractical. Although there is no such finding in this order, this omission by the trial court cannot serve as a basis for reversing the award because defendants' assignment of error is inadequate to preserve this error for review. The relevant assignment of error, "[t]he Trial Court's award . . . without evidence to support the facts, facts to support the conclusions, and conclusions to support its Order," fails to direct this Court to the findings challenged as inadequate and is no more than a broadside attack on the order of the court and thus ineffective. N.C.R. App. P. 10(c)(1) (1992); *see also Jones v. Shoji*, 110 N.C. App. 48, 51, 428 S.E.2d 865, 866-67 (1993). In any event, all the evidence in this record would support a finding that it would have been impractical to order the defendants to transfer a portion of the paving and construction company to the plaintiff. Such a transfer in kind would only have disrupted the operation of the construction company, which was a partnership owned by the plaintiff's former husband and his father and brother. Furthermore, converting the interest in the partnership to usable cash would have been most difficult.

II

The issue presented is whether an interim award under Section 50-20(i1) must be determined, as defendants argue, consistent with every other "provision of Section 50-20 and the considerable body of equitable distribution caselaw."

An interim allocation of marital assets is in the nature of a preliminary injunction. As such, the matter can be decided on verified pleadings and affidavits, N.C.G.S. § 1-485 (1983); *State of North Carolina ex rel. Morgan v. Dare To Be Great, Inc.*, 15 N.C. App. 275, 276, 189 S.E.2d 802, 803 (1972), "but the court may direct that the matter be heard wholly or partly on oral testimony or depositions[.]" N.C.G.S. § 1A-1, Rule 43(e) (1990); and the moving party is required to make only a prima facie showing, that is that her ultimate success in the equitable distribution proceeding is a likelihood, at least to the extent of the interim award requested. *See Ridge Community Investors, Inc. v. Berry*, 293 N.C. 688, 701, 239 S.E.2d 566, 574 (1977). Accordingly, the procedure utilized and

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the evidence considered by the trial court differs substantially from that required for the entering of a final equitable distribution judgment. For example, it is not necessary for the trial court to accept evidence on the distributional factors of Section 50-20(c). To hold otherwise would convert the interim award proceeding into a full trial on the merits and thus preclude any relief until the parties are fully prepared to proceed to a full scale trial and the case can be scheduled for trial. This summary proceeding is further justified by the language of the statute which requires "a full accounting when the property is ultimately allocated in an equitable distribution judgment." N.C.G.S. § 50-20(i1) (Supp. 1992).

In this case, the trial court considered, in addition to oral and written arguments, a referee's report which valued the marital property at \$2,400,000. Thus, based on the value of the marital estate and the fact that there was no evidence of any marital debt, there was a likelihood that the plaintiff would ultimately prevail on the merits at least to the extent of \$400,000.

Furthermore, because of the preliminary nature of the interim award proceeding, it was unnecessary for the trial court to rule on defendants' objections and exceptions to the referee's report prior to ordering an interim allocation of marital assets.

N.C. Gen. Stat. § 1A-1, Rule 53(g)(2) requires the trial judge, upon exception duly noted by a party, to consider the evidence and "give his own opinion and conclusion, both upon the facts and the law." N.C.G.S. § 1A-1, Rule 53(g)(2) (1990); *Quate v. Caudle*, 95 N.C. App. 80, 83, 381 S.E.2d 842, 844 (1989). This duty, however, applies only as a prerequisite to the entry of a final judgment based on the report. In the case presented, the award was interim in nature and any findings and conclusions entered by the trial court are "not res adjudicata on the final hearing." *Schloss v. Jamison*, 258 N.C. 271, 276, 128 S.E.2d 590, 594 (1962). Thus, the defendants will have ample opportunity to have their objections and exceptions ruled on by the trial court prior to the entry of the final judgment of equitable distribution.

Based on the above analysis, I would affirm the order of the trial judge granting plaintiff's motion for an interim cash award under Section 50-20(i1).

WIGGINS v. NATIONWIDE MUTUAL INS. CO.

[112 N.C. App. 26 (1993)]

**TIMOTHY B. WIGGINS v. NATIONWIDE MUTUAL INSURANCE COMPANY,
ROBERT GARDNER, BILL HOLLAR, AND D. R. ARNEY**

No. 9210SC531

(Filed 21 September 1993)

1. Insurance § 532 (NCI4th) — UIM limits required to equal bodily injury limits

Since N.C.G.S. § 20-279.21(b)(4) (1983) required UIM limits to equal bodily injury liability limits, the applicable UIM coverage was \$100,000 rather than \$50,000 as the policy itself provided.

Am Jur 2d, Automobile Insurance § 293.

2. Insurance § 528 (NCI4th) — plaintiff as non-owner, non-family member—no intrapolicy stacking of UIM coverage

It was error for the trial court to allow plaintiff to stack the UIM coverage of two vehicles listed in the automobile owner's insurance policy on an intrapolicy basis, since plaintiff was only "occupying" one of the vehicles at the time of the accident, and N.C.G.S. § 20-279.21(b)(3) does not provide for intrapolicy stacking of the coverages under the policy because as a non-owner, non-family member passenger in the vehicle, plaintiff was a Class II insured under the owner's policy, and coverage for a Class II insured is tied only to the vehicle occupied by the injured at the time of the accident.

Am Jur 2d, Automobile Insurance §§ 322, 326, 329.

3. Insurance § 528 (NCI4th) — policy owned by plaintiff—intra-policy stacking allowed

In spite of policy language to the contrary, plaintiff was permitted to intrapolicy stack the UIM coverage for the two vehicles listed in his own policy so that the total amount of coverage available to him pursuant to his policy was \$200,000.

Am Jur 2d, Automobile Insurance §§ 326, 329.

4. Insurance § 528 (NCI4th) — UIM coverage—interpolicy stacking allowed prior to amendment of statute

There was no merit to defendant insurance company's contention that because the accident giving rise to the claim occurred prior to the enactment of the 1985 amendment to

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N.C.G.S. § 20-279.21(b)(4), which added an interpolicy stacking requirement, the insurance policy controlled, since the North Carolina Supreme Court has held that interpolicy stacking pursuant to the statute was contemplated prior to 1985 and was only clarified by the amendment.

Am Jur 2d, Automobile Insurance §§ 326, 329.

5. Insurance § 530 (NCI4th) — payments under one UIM policy — no credit under another UIM policy

Defendant insurance company was not entitled to a credit under one UIM policy for payments made under another UIM policy.

Am Jur 2d, Automobile Insurance §§ 293, 298.

6. Insurance § 528 (NCI4th) — UIM coverage — plaintiff entitled to recover costs and prejudgment interest

In an action to recover on UIM policies, plaintiff was entitled to recover costs and prejudgment interest from defendant insurer.

Am Jur 2d, Automobile Insurance § 428.

Appeal by defendants from order for partial summary judgment entered 6 February 1992 by Judge Narley L. Cashwell in Wake County Superior Court. Heard in the Court of Appeals 27 April 1993.

LeBoeuf, Lamb, Leiby & MacRae, by Peter M. Foley and Stephanie Hutchins Autry, for the defendant-appellant Nationwide Mutual Insurance Company.

Blanchard, Twiggs, Abrams, & Strickland, P.A., by Douglas B. Abrams and Jerome P. Trehy, Jr., for plaintiff-appellee.

WYNN, Judge.

This action arose out of an automobile accident occurring on 13 April 1984. Plaintiff, Timothy Wiggins, was injured while riding as a passenger in a Volkswagen owned and operated by Kathryn Crowe (Crowe vehicle). The Crowe vehicle was struck by an automobile owned and operated by Joseph Stone, the tortfeasor. At the time of the accident, plaintiff was the named insured under a policy issued by Nationwide Mutual Insurance Co. (Nationwide),

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providing underinsured motorist coverage (UIM) in the amount of \$50,000 per person/\$100,000 per accident on two separate vehicles (Wiggins Policy). The Crowe vehicle also was insured by Nationwide under a policy issued to Robert and Eleanor Crowe (Crowe Policy). The Crowe vehicle was one of two vehicles listed on the Crowe policy which provided UIM coverage in the amount of \$100,000 per person/\$300,000 per accident. Stone was insured by Reliance Insurance Company (Reliance) under a policy providing \$25,000 per person for bodily injury (Stone policy).

Plaintiff filed a negligence action against the tortfeasor, Stone, seeking damages for personal injuries suffered in the automobile accident. Reliance paid plaintiff its \$25,000 policy limit prior to trial. The case was tried before a jury and the jury found plaintiff's injuries were caused by Stone's negligence and held plaintiff entitled to recover \$160,000 for personal injuries. A judgment was entered against Stone for that amount plus costs and prejudgment interest from the date of the filing of the complaint, 2 April 1987.

Thereafter, plaintiff brought this action against Nationwide and three of Nationwide's employees, Robert Gardner, Bill Hollar, and D.R. Arney. The complaint alleged breach of contract and bad faith by Nationwide and alleged negligence and unfair and deceptive trade practices by all defendants. Nationwide thereafter paid plaintiff \$82,167.15 (\$75,000 plus post-judgment interest) representing the \$100,000 UIM coverage under the Crowe policy, less the \$25,000 paid under the Stone policy. Plaintiff and Nationwide both filed motions for judgment on the pleadings, partial summary judgment and motions to compel. The trial court granted plaintiff's motion for partial summary judgment as to paragraphs one and two of plaintiff's motion which alleged 1) that Nationwide is obligated to pay the entire judgment, plus costs, including interest on the entire judgment with a reduction for the \$25,000 paid by the primary carrier; and 2) that the UIM coverage under both the Wiggins and Crowe policies issued by Nationwide must be aggregated, requiring both intra- and interpolicy stacking for the purpose of satisfying the judgment. The trial court denied the remainder of plaintiff's motion for partial summary judgment; held that the parties' respective motions to compel were moot; denied all other motions; and determined that Nationwide owed UIM coverage to the plaintiff under the Wiggins and Crowe policies. In ordering payment, the trial court stated:

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Nationwide is obligated to pay the entire judgment, plus costs, including interest on the entire judgment . . . with a reduction for the \$25,000 previously paid by the primary carrier and with a reduction for the \$82,167.15 paid by the Defendant Nationwide as a partial satisfaction of the judgment obtained in the underlying action, which payment was made under the Crowe Policy . . .

(4) The Partial Payment by the Defendant Nationwide made on July 19, 1991, in the amount of \$82,167.15 is allocated first to the outstanding interest, as of that date, in the amount of \$46,010.94; making a payment of principal in the amount of \$36,156.21; and with the outstanding balance as of July 19, 1991 being \$98,843.79; and with legal interest of 8% running on that principal balance from July 19, 1991 until the judgment is paid in full.

Nationwide appeals from entry of the trial court's order. We affirm.

The issues we confront include: 1) whether the UIM coverage under the plaintiff's policy was equal to the bodily injury liability limits under the same policy; 2) whether the UIM coverage for two vehicles in an owner, Class I insured's policy is subject to intrapolicy stacking; 3) whether the UIM coverage for two vehicles in a policy may be intrapolicy stacked for the benefit of a non-owner Class II insured; 4) whether the UIM coverage for a Class I insured under one policy may be interpolicy stacked with the UIM coverage under another policy in which the party is a Class II insured; and 5) whether the UIM carrier is obligated to pay prejudgment interest on the compensatory damages award of the jury in the underlying tort action by its insured against the tortfeasor.

In determining "whether insurance coverage is provided by a particular automobile liability insurance policy, careful attention must be given to the type of coverage, the relevant statutory provisions, and the terms of the policy." *Smith v. Nationwide Mut. Ins. Co.*, 328 N.C. 139, 142, 400 S.E.2d 44, 47, *reh'g denied*, 328 N.C. 577, 403 S.E.2d 514 (1991). *Mitchell v. Nationwide Ins. Co.*, 110 N.C. App. 16, 429 S.E.2d 351, *rev. allowed*, 334 N.C. 164, 432 S.E.2d 363 (1993). In the present case, the type of coverage at issue is UIM coverage. The relevant statute is N.C.G.S. § 120-279.21(b)(4) (1983).

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We note initially that plaintiff is entitled to coverage under both of the policies pursuant to the policy language. The Wiggins and the Crowe policies, both of which were issued by Nationwide, contain definitions of certain terms used throughout the policy, including:

“you” and “your” refer to:

1. The “named insured” shown in the Declarations;
and
2. The spouse if a resident of the same household.

Part D, the uninsured and UIM coverage section of the policies provides:

We will pay damages which a **covered person** is legally entitled to recover from the owner or operator of an [underinsured] motor vehicle because of:

1. Bodily injury sustained by a **covered person** and caused by an accident;

.

“**Covered person**” as used in this Part means:

1. You or any **family member**.
2. Any other person **occupying**:
 - a. **your covered auto**; or
 - b. any other auto operated by you.

Plaintiff is covered under the Wiggins policy because he is the named insured and owns the policy. In addition, he is covered under the Crowe policy because he was “occupying” the Crowe vehicle at the time of the accident.

I.

[1] Nationwide contends that the UIM limit under the Wiggins policy is \$50,000 per person as the policy provides. Plaintiff argues in response that the statute requires UIM limits to equal bodily injury liability limits, which under the Wiggins policy were \$100,000; therefore, the applicable UIM coverage policy was \$100,000 rather than \$50,000. We agree with Plaintiff’s response.

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When a statute is applicable to the terms of an insurance policy, the provisions of the statute become terms of the policy, as if written into it. If the terms of the statute and the policy conflict, the statute prevails. *Sutton v. Aetna Cas. & Sur. Co.*, 325 N.C. 259, 263, 382 S.E.2d 759, 762, *reh'g denied*, 325 N.C. 437, 384 S.E.2d 546 (1989).

At the time of the accident, the statute in effect provided:

[Automobile liability insurance policies] shall . . . provide underinsured motorist coverage, to be used only with policies that are written at limits that exceed those prescribed by subdivision (2) of this section and that afford uninsured motorist coverage as provided by subdivision (3) of this subsection, but not to exceed the policy limits for automobile bodily injury liability as specified in the owner's policy.

N.C.G.S. § 20-279.21(b)(4) (1983).

This statute was amended in 1985 to require that unless rejected by the policyholder, each automobile insurance policy issued in this state must have UIM coverage in the same amount as the personal injury liability coverage. The North Carolina Supreme Court thereafter held that the amendment merely clarified legislative intent and therefore the 1983 version of the statute, though not as clearly written, meant the same thing. *Proctor v. N.C. Farm Bureau Mut. Ins. Co.*, (*Proctor I*), 324 N.C. 221, 225, 376 S.E.2d 761, 764 (1989). *See also Sproles v. Greene*, 100 N.C. App. 96, 394 S.E.2d 691 (1990), *aff'd in part, rev'd on other grounds*, 329 N.C. 603, 407 S.E.2d 497 (1991). The UIM coverage under the Wiggins policy was therefore \$100,000 for each of the two vehicles listed on the policy.

II.

[2] We next consider whether it was error for the trial court to allow plaintiff to stack the coverage of two vehicles listed in the Crowe policy on an intrapolicy basis. As a "covered" person, plaintiff is entitled to the \$100,000 in UIM coverage under the Crowe policy. The policy language does not, however, entitle plaintiff to intrapolicy stack the UIM coverage on the two vehicles listed under the Crowe policy because he was only "occupying" the Volkswagen at the time of the accident.

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In addition, the statute does not provide for intrapolicy stacking of the coverages under the Crowe policy because as a non-owner, non-family member passenger in the Crowe vehicle, plaintiff is a Class II insured under the Crowe policy.

N.C.G.S. § 20-279.21(b)(3) establishes two classes of “‘persons insured:’ (1) the named insured and, while resident of the same household, the spouse of the named insured and relatives of either and (2) any person who uses with the consent, express or implied, of the named insured, the insured vehicle, and a guest in such vehicle.” *Crowder v. N.C. Farm Bureau Mut. Ins. Co.*, 79 N.C. App. 551, 554, 340 S.E.2d 127, 129-30, *disc. rev. denied*, 316 N.C. 731, 345 S.E.2d 387 (1986). In Class I, a person is insured whether or not the insured vehicle is involved in the injuries. *Id.* at 554, 340 S.E.2d at 130. UIM coverage for a Class II insured is tied to the vehicle occupied by the injured at the time of the accident. As a result, plaintiff has no coverage under the portion of the Crowe policy tied to the other list vehicle and there are no coverages to stack under the Crowe policy. Rather plaintiff is entitled to the UIM coverage only for the Volkswagen he was occupying at the time of the accident. *Nationwide Mut. Ins. Co. v. Silverman*, 332 N.C. 633, 423 S.E.2d 68 (1992). Therefore, the trial court’s order granting summary judgment to the plaintiff on this issue was error.

III.

[3] The issue we next address is whether the UIM coverage of \$100,000 per vehicle under the Wiggins policy was subject to intrapolicy stacking as the trial court ordered. Defendant argues that neither the policy language nor the 1983 version of N.C.G.S. § 20-279.21(b)(4) requires intrapolicy stacking in this case.

The Wiggins policy, like the Crowe policy, contains a limit of liability clause under the UIM provisions which provides:

The limit of bodily injury shown in the Declarations for “each person” for Uninsured Motorist Coverage is our maximum limit of liability for all damages for bodily injury sustained by any one person in any one auto accident. . . . This is the most we will pay for bodily injury and property damage regardless of the number of:

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1. Covered persons;
2. Claims made;
3. Vehicles or premiums shown in the Declarations; or
4. Vehicles involved in the accident.

(Emphasis omitted).

This exact policy language has appeared in previous opinions from the Supreme Court and this Court. Those opinions consistently have held that the relevant statute prevails over this policy language. *See Proctor v. N.C. Farm Bureau Ins. Co.*, (*Proctor II*), 107 N.C. App. 26, 31, 418 S.E.2d 680, 683, *disc. rev. denied on additional issues, appeal dismissed*, 333 N.C. 346, 426 S.E.2d 709 (1993); *Davis v. Nationwide Mut. Ins. Co.*, 106 N.C. App. 221, 415 S.E.2d 767, *disc. rev. denied*, 332 N.C. 343, 421 S.E.2d 146 (1992); *Sutton v. Aetna Cas. & Sur. Co.*, 325 N.C. 259, 382 S.E.2d 759, *reh'g denied*, 325 N.C. 437, 384 S.E.2d 546 (1989).

In *Proctor II*, Farm Bureau made the same argument Nationwide makes in this case. In rejecting Farm Bureau's argument, this Court stated:

In *Sutton*, our Supreme Court decided that N.C. Gen. Stat. 20-279.21(b)(4) (1983 & Cum. Supp. 1988), required both interpolicy and intrapolicy UIM stacking [for the benefit of a non-owner, named insured] despite insurance policy language to the contrary. The *Sutton* court in part relied upon the 1985 statutory amendment, however, other public policy reasons were cited as being the basis for allowing intrapolicy stacking of UIM coverage.

Proctor II, 107 N.C. App. at 31, 418 S.E.2d at 683.

As owner and named insured of the Wiggins policy, plaintiff is a Class I insured. Our courts have clearly established that a Class I insured may recover under the UIM provisions of a policy "even where the insured vehicle is not involved in the insured's injuries." *Crowder*, 79 N.C. App. at 554, 340 S.E.2d at 130. *See also Grain Dealers Mut. Ins. Co. v. Long*, 332 N.C. 477, 421 S.E.2d 142 (1992); *Bass v. N.C. Farm Bureau Mut. Ins. Co.*, 332 N.C. 109, 418 S.E.2d 221 (1992); *Harris v. Nationwide Mut. Ins. Co.*, 332 N.C. 184, 420 S.E.2d 124 (1992).

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Based on *Sutton*, *Proctor II*, and *Sproles*, we conclude that plaintiff is permitted to intrapolicy stack the coverage for the two vehicles listed under the Wiggins policy. The total amount of coverage available to plaintiff pursuant to the Wiggins policy is therefore \$200,000.

IV.

[4] Having found that plaintiff is entitled to intrapolicy stack the coverage under the Wiggins policy but not under the Crowe policy, we next determine whether the \$100,000 applicable under the Crowe policy may be interpolicy stacked with the \$200,000 of applicable coverage under the Wiggins policy.

Nationwide contends that because the accident giving rise to the claim occurred prior to the enactment of the 1985 amendment to N.C.G.S. § 20-279.21(b)(4), which added an interpolicy stacking requirement, the insurance policy controls. This identical issue was addressed with respect to interpolicy stacking by both this Court and the North Carolina Supreme Court. *Sutton*, 325 N.C. at 265, 382 S.E.2d at 763, *Proctor II*, 107 N.C. App. at 30, 418 S.E.2d at 683. In *Sutton* our Supreme Court "voiced explicitly, that interpolicy stacking pursuant to N.C.G.S. § 20-279.21(b)(4) was contemplated prior to 1985, and was only clarified by the later amendment." *Proctor II*, 107 N.C. App. at 30, 418 S.E.2d at 683.

It follows that the trial court did not err in allowing the interpolicy stacking between the Wiggins and Crowe policies.

V.

[5] Nationwide next contends that it is entitled to a credit for the \$75,000 it paid to plaintiff under the Crowe policy as well as the \$25,000 paid under the Stone policy. Applying these credits, defendant contends that the coverage under the Wiggins policy is exhausted.

N.C.G.S. § 20-279.21(b)(4) (1983) provides in pertinent part that:

The insurer shall not be obligated to make any payment because of bodily injury to which underinsured motorist insurance coverage applies and that arises out of the ownership, maintenance, or use of an underinsured highway vehicle until after the limits of liability under all bodily injury bonds or insurance policies applicable at the time of the accident have

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been exhausted by payment of judgments or settlements, and provided the limit of payment is only the difference between the limits of the liability insurance that is applicable and the limits of the underinsured motorist coverage as specified in the owner's policy.

Therefore, Nationwide is entitled to a credit of the \$25,000 paid to Wiggins by Reliance, Stone's carrier. Nationwide, however, is not entitled to a credit of \$75,000, the amount it paid under the Crowe policy. *Sproles* states that "an insured may collect under multiple underinsured motorist policies up to, but not more than, his actual loss and that a carrier having accepted a premium for underinsured motorist coverage may not deny coverage on the ground that other such insurance is available to the insured." *Sproles*, 100 N.C. App. at 103, 394 S.E.2d at 695. See also *Moore v. Hartford Fire Ins. Co.*, 270 N.C. 532, 543, 155 S.E.2d 128 (1967). Therefore, Nationwide is not entitled to a credit under one UIM policy for payments made under another UIM policy. See *Harrington v. Stevens*, 334 N.C. 586, 434 S.E.2d 212 (1993), *Dungee v. Nationwide Mut. Ins. Co.*, 108 N.C. App. 599, 424 S.E.2d 234, *disc. rev. denied*, 333 N.C. 537, 429 S.E.2d 555 (1993).

VI.

[6] Nationwide next argues that the trial court erred in ruling that plaintiff is entitled to recover costs and prejudgment interest from Nationwide. The trial court ordered Nationwide to pay plaintiff the costs of the underlying action plus prejudgment interest on the judgment amount less the \$25,000 paid by Reliance. In addition, the trial court allocated the \$82,167.15 that Nationwide previously paid between the principal and interest.

Nationwide contends that under the policy language it has no contractual obligation to pay the prejudgment interest in this case. Both the Crowe and the Wiggins policies contain the following provisions in the UIM coverage sections:

We will pay damages which a covered person is legally entitled to recover from the owner or operator of an [underinsured] motor vehicle because of:

1. Bodily injury sustained by a covered person and caused by an accident; and
2. Property damage caused by an accident.

(Emphasis omitted).

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Nationwide argues that “damages” does not include costs or interest. The North Carolina Supreme Court recently addressed this exact issue in *Baxley v. Nationwide Mut. Ins. Co.*, 334 N.C. 1, 430 S.E.2d 895 (1993). After a thorough examination of what is contemplated by the term “damages” the Court held that under the terms of the policy, Nationwide was obligated to pay prejudgment interest on the jury verdict up to its policy limits. As in *Baxley*, Nationwide in this case “promised to pay plaintiff’s resulting damages, [thus] it must now do so up to, but not in excess of, its UIM policy limits.” *Baxley*, 334 N.C. at 11, 430 S.E.2d at 901.

Based on the foregoing discussion, the decision of the trial court is:

REVERSED as to the trial court’s order allowing intrapolicy stacking for the two Crowe vehicles, and

AFFIRMED in all other aspects.

Judges WELLS and GREENE concur.

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No. 9210SC302

(Filed 21 September 1993)

Liens § 35 (NCI4th)— lien of second tier subcontractor—failure of notice to name general contractor or show tiered relationships—notice insufficient

The trial court properly determined that the “Claim of Lien and Notice of Claim of Lien” filed and served by plaintiff, a second tier subcontractor, failed to comply with the notice requirements of N.C.G.S. § 44A-19 and -23, since the statutory form is replete with references to the fact that a subcontractor is claiming a lien by way of subrogation; plaintiff’s “Notice” was not titled in a manner which made it unmistakable from

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the outset that the lien was being claimed by way of subrogation, or by a subcontractor; plaintiff never named defendant general contractor in its "Notice" and did not make specific reference to the relationships connecting the landowner, general contractor, subcontractor, and plaintiff; and a claim of lien which is intended to place the world on notice of the claim must clearly delineate the tiered relationships in which the claimant is involved so that the owner may understand how the claim has arisen and so that a title searcher may ascertain which entities are potential claimants and how each is connected to the real estate.

Am Jur 2d, Mechanics' Liens §§ 171-173, 210, 219.

Appeal by plaintiff from Memorandum of Decision entered 30 December 1991 and from order entered 31 January 1992 by Judge Henry V. Barnette, Jr. in Wake County Superior Court. Heard in the Court of Appeals 11 February 1993.

Smith, Debnam, Hibbert & Pahl, by Bettie Kelley Sousa and Elizabeth B. Godfrey, for plaintiff-appellant.

Petree, Stockton & Robinson, by J. Anthony Penry, for defendant-appellees.

JOHN, Judge.

Plaintiff appeals an order granting summary judgment to defendants Blaine Hays Construction Company (Blaine Hays) and Marriott Corporation (Marriott) and denying its own motion for summary judgment. Plaintiff contends the trial court erred by ruling the "Claim of Lien and Notice of Claim of Lien" filed and served by plaintiff failed to comply with the notice requirements established in Article 2 of Chapter 44A of the North Carolina General Statutes, specifically those designated in N.C.G.S. § 44A-19 (1989). We disagree.

In particular, plaintiff, a second tier subcontractor, questions the court's reading of the applicable sections of the statutory scheme. It asserts the notice requirements for the type of lien involved herein are controlled by N.C.G.S. § 44A-12 (1989), and that its "Claim of Lien and Notice of Claim of Lien" substantially complied therewith. Plaintiff therefore alleges its lien was perfected and its suit for enforcement timely filed, making it error for the court

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to have granted defendants' motion for summary judgment. Moreover, plaintiff contends defendants' affidavit opposing plaintiff's motion for summary judgment did not address or refute with sufficient specificity each point addressed in plaintiff's affidavit supporting its motion. As a result, plaintiff requests we not only reverse the order of summary judgment in favor of defendants, but also grant plaintiff's motion for partial summary judgment regarding particular factual allegations in its affidavit. We hold the trial court correctly construed the relevant statutes in determining plaintiff failed to provide proper notice of its claim of lien, and therefore affirm.

Pertinent facts include the following: in June 1987, Blaine Hays entered into a contract with Marriott for the construction of a Courtyard motel on a tract of real property owned by Marriott and located in Cary, North Carolina. In its capacity as general contractor for the project, Blaine Hays contracted out certain electrical work to a first tier subcontractor, Roper Electric Contractors, Inc. (Roper). Roper ordered from plaintiff electrical supplies and materials to be incorporated into the Courtyard project.

Plaintiff allegedly delivered, pursuant to its agreement with Roper, \$63,919.78 worth of supplies and materials to the Courtyard construction site between 28 September 1987 and 5 January 1988. Roper subsequently abandoned work on the project, failed to compensate plaintiff, and filed for bankruptcy on 24 February 1988.

On 26 February 1988 plaintiff filed with the Wake County Clerk of Superior Court a document entitled "Claim of Lien and Notice of Claim of Lien" against the real property owned by Marriott, and served copies on Marriott, Blaine Hays, and Roper. Plaintiff thereafter sought to enforce its purported lien by filing a complaint on 17 May 1988, setting forth claims based on a lien on any funds owed by Blaine Hays to Roper, pursuant to N.C.G.S. § 44A-18(2) (1989), and on a lien upon the improved real estate by way of subrogation to any lien rights of Blaine Hays against Marriott, pursuant to N.C.G.S. § 44A-23 (1989 & Cum. Supp. 1992).

Defendants denied liability in their jointly-filed answer. On 1 November 1989, Blaine Hays filed a surety bond in the amount of \$79,899.73, conditioning payment upon a finding the purported lien was properly noticed and perfected. Plaintiff and defendants filed cross-motions for summary judgment, and a hearing was held on 12 November 1991. The court issued a memorandum of decision,

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memorialized by order dated 3 February 1992, which denied plaintiff's motion and granted that of defendants.

The court's order reasoned the document filed by plaintiff did not comply with the notice requirements of G.S. § 44A-23. Additionally, the court held plaintiff's lien on funds also failed because no money was owing from Blaine Hays to Roper at the time plaintiff's "Notice" was filed. Plaintiff appeals only that portion of the order granting defendants summary judgment on plaintiff's claim to a lien by way of subrogation, foregoing its claim to a lien on funds.

I.

Plaintiff first maintains the trial court committed reversible error by granting defendants' motion for summary judgment pursuant to Rule 56 of the North Carolina Rules of Civil Procedure. Summary judgment is designed to "ferret out those cases in which there is no genuine issue as to any material fact and in which, upon such undisputed facts, a party is entitled to judgment as a matter of law." *Haithcock v. Chimney Rock Co.*, 10 N.C. App. 696, 698-99, 179 S.E.2d 865, 867 (1971). The movant bears the burden of establishing that no genuine issue of material fact exists, and may carry that burden by "proving that an essential element of the opposing party's claim is non-existent." *Executive Leasing Assocs., Inc. v. Rowland*, 30 N.C. App. 590, 592, 227 S.E.2d 642, 644 (1976) (citation omitted).

In support of its motion below, defendants argued plaintiff's lien was improperly noticed, was thus not perfected, and therefore plaintiff could not bring an action against defendants seeking enforcement of the alleged lien. The court agreed with defendants, stating in its order:

The claim of lien and notice of claim of lien filed and served by plaintiff fail to comply with the provisions of Chapter 44A . . . regarding liens by subrogation. Plaintiff failed to give proper notice of its claim of lien, in accordance with Article 2 of Chapter 44A, as required by . . . 44A-23. That being the case, plaintiff's lien perfection action must fail as a matter of law.

A claim of lien must be properly noticed and properly filed, in order for the underlying lien to be perfected. If a lien is not per-

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fectured, it cannot be enforced. *Strickland v. General Bldg. & Masonry Contractors, Inc.*, 22 N.C. App. 729, 731, 207 S.E.2d 399, 400 (1974).

We note G.S. § 44A-23 was amended in 1991; however, the newer version of the statute is applicable only to actions filed on or after 22 July 1992. As plaintiff filed suit on 17 May 1991, the language of G.S. § 44A-23 in effect at that time controls, and provides as follows:

A . . . second . . . tier subcontractor, *who gives notice as provided in this Article*, may, to the extent of his claim, enforce the lien of the contractor created by Part 1 of Article 2 of this Chapter. The manner of such enforcement shall be as provided by G.S. 44A-7 through 44A-16. The lien is perfected as of the time set forth in G.S. 44A-10 upon filing of claim of lien pursuant to G.S. 44A-12. Upon the filing of the notice and claim of lien and the commencement of the action, no action of the contractor shall be effective to prejudice the rights of the subcontractor without his written consent.

G.S. § 44A-23 (1989) (emphasis added).

Plaintiff insists the notice requirements set out in G.S. § 44A-12 apply to a lien sought by way of subrogation to the lien rights of a contractor who deals directly with the owner, as provided for in G.S. § 44A-23. It relies upon this language of the latter section: "filing of claim of lien pursuant to G.S. 44A-12." Plaintiff further contends the instrument filed on 26 February 1988 substantially complied with the form set out in G.S. § 44A-12, in that it included all information required therein. "[D]eviation from a statutory form is permissible so long as the content set out in the form is present." *Contract Steel Sales, Inc. v. Freedom Construction Co.*, 321 N.C. 215, 223, 362 S.E.2d 547, 552 (1987). Therefore, plaintiff continues, it has at once properly noticed and perfected its lien. However, plaintiff confuses the requirements for *notice* and for *filing* specified in G.S. § 44A-23.

Assuming *arguendo* that plaintiff's "Claim of Lien and Notice of Claim of Lien" is in substantial compliance with the form specified in G.S. § 44A-12, we nonetheless observe the *Contract Steel* case cited by plaintiff concerns a *lien upon funds* under G.S. § 44A-18. With respect to a lien by way of subrogation to the lien rights of the general contractor against the owner's real property pur-

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suant to G.S. § 44A-23, however, another statutory section governs notice requirements.

The italicized words in G.S. § 44A-23 above direct notice must be given "as provided in this Article." Because the General Assembly grouped certain statutory sections within the same portion of Article 2, they are to be construed *in pari materia*. *Electric Supply Co. of Durham, Inc. v. Swain Elec. Co., Inc.*, 328 N.C. 651, 658, 403 S.E.2d 291, 295-96. The *only* section of Part 2, Article 2 of Chapter 44A addressing the giving of notice is G.S. § 44A-19. It provides:

(a) Notice of a claim of lien *shall* set forth:

- (1) The name and address of the person claiming the lien,
- (2) A general description of the real property improved,
- (3) The name and address of the person with whom the lien claimant contracted to improve real property,
- (4) *The name and address of each person against or through whom subrogation rights are claimed,*
- (5) A general description of the contract and the person against whose interest the lien is claimed, and
- (6) The amount claimed by the lien claimant under his contract.

(b) All notices of claims of liens by first, second or third tier subcontractors *must* be given using a form substantially as follows:

**NOTICE OF CLAIM OF LIEN BY
FIRST, SECOND OR THIRD TIER SUBCONTRACTOR**

To:

1., owner of property involved.
(Name and address)
2., general contractor.
(Name and address)
3., first tier subcontractor against
(Name and address) or through whom subrogation
is claimed, if any.

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4., second tier subcontractor
 (Name and address) against or through whom
 subrogation is claimed, if any.

General description of real property where labor performed or material furnished:

.....

General description of undersigned lien claimant's contract including the names of the parties thereto:

.....

The amount of lien claimed pursuant to the above described contract: \$

The undersigned lien claimant gives this notice of claim of lien pursuant to North Carolina law and claims all rights of subrogation to which he is entitled under Part 2 of Article 2 of Chapter 44A of the General Statutes of North Carolina.

Dated

....., Lien Claimant

.....
 (Address)

G.S. § 44A-19 (emphasis added).

Under this statute, therefore, in order to provide proper notice to the owner of the property, it is mandatory that a claimant set forth with specificity the information required by each part of subsection (a) above listed. Moreover, in so doing, there must be substantial compliance with the given statutory form. *Contract Steel Sales, Inc. v. Freedom Construction Co.*, 84 N.C. App. 460, 466, 353 S.E.2d 481, 422, *aff'd*, 321 N.C. 215, 362 S.E.2d 547 (1987).

We now contrast the precise language of the "Claim of Lien and Notice of Claim of Lien" filed by plaintiff with the wording of the form included within G.S. § 44A-19. Plaintiff's document stated the following:

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CLAIM OF LIEN AND NOTICE OF CLAIM OF LIEN

. . .

NOW COMES Cameron & Barkley Company and provides the following Notice of Claim of Lien.

1. Name and address of the person claiming the lien:

Cameron & Barkley Company, 2864 Azalea Dr., Box 10067, Charleston, SC 29411.

2. Name and address of the record owner of the real property claimed to be subject to the lien at the time the claim of lien is filed:

Marriott Corporation, Marriott Drive, Washington, D.C. 20058

3. Name and address of the general contractor or subcontractor against or through whom subrogation is claimed, if any:

Roper Electrical Company, P.O. Box 5662, Sta B, Greenville, SC 29605

4. Description of the real property upon which the lien is claimed:

Courtyard by Marriott [sic], 102 Edinburgh, South, Cary, NC 27511

5. Description of the lien claimant's contract including the names of the parties thereto:

Cameron & Barkley contracted with Roper Electrical Co. to provide electrical equipment to be used for the improvement of real property described above.

6. Name and address of the person with whom the claimant contracted for the furnishing of labor or materials:

Roper Electrical Company, P.O. Box 5662, Sta B, Greenville, SC 29605

7. Date upon which labor or materials were first furnished upon said property by the claimant:

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Electrical supplies and materials were first furnished by Cameron & Barkley on September 28, 1987.

8. Date upon which labor or materials were last furnished upon said property by the claimant:

Electrical supplies and materials were last furnished by Cameron & Barkley on January 5, 1988.

9. General description of the labor performed or materials furnished:

Electrical supplies and materials

10. Amount claimed by lien claimant:

\$63,919.78.

This the 23 day of February, 1988.

With respect to liens against real property by way of subrogation to the lien rights of the general contractor, "substantial compliance" with the statutory form requires more than plaintiff has provided herein. This is particularly so because the form is replete with references to the fact a *subcontractor* is claiming a *lien by way of subrogation*. We hold plaintiff's notice of claim of lien is inadequate to convey the notice required by G.S. § 44A-19.

Preliminarily, plaintiff's "Notice" is not titled in a manner which makes it unmistakable from the outset the lien is being claimed by way of subrogation, or by a subcontractor. Instead it reads: "CLAIM OF LIEN AND NOTICE OF CLAIM OF LIEN."

Next, plaintiff never names Blaine Hays. G.S. § 44A-19(a)(4) renders it mandatory that the name(s) of each entity through whom subrogation is claimed be provided. The statutory form clearly lists all parties in the construction chain in descending order (designated in 1.-4. above), thereby linking the owner of the property to the second tier subcontractor. Although plaintiff indicates the owner as Marriott Corporation, it fails to specify Blaine Hays as the general contractor. Nowhere is a direct statement that plaintiff is a second tier subcontractor, hired by merit of the underlying contract between Marriott and Blaine Hays. Indeed, there is scant mention of subrogation at all, and no specific reference to the relationships connecting Marriott to Blaine Hays, Blaine Hays to Roper, and then Roper to plaintiff.

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The form provided in G.S. § 44A-19 is designed to make recognition of those relationships instantly clear to the recipient of the notice, and plaintiff has not substantially complied therewith. If a claimant veers from a statutorily suggested form, it does so at its own peril. *Contract Steel*, 321 N.C. at 223, 362 S.E.2d at 552. Plaintiff's form is fatally deficient for failure to give the required notice.

We recognize plaintiff designedly attempted to conform to the provisions of G.S. § 44A-12. However, that statute addresses a different purpose. It is contained within Part 1 of Article 2 of Chapter 44A, which concerns liens of those dealing directly with the owner of property against which a lien is claimed. The form provided therein demands less specificity because fewer entities are involved, and the property owner is presumptively aware of its direct contractual relationships. Also, a title-searcher can easily discern there is a lien upon the owner's property, without sifting through various tiers of sub-contractors. G.S. § 44A-19, on the other hand, is contained within Part 2 of Article 2, relating to those whose direct dealings are with one other than the owner of the property. While the purpose of G.S. § 44A-19 may be to provide the owner-obligor with notice, *Contract Steel*, 84 N.C. App. 460, 470, 353 S.E.2d 418, 424, *aff'd*, 321 N.C. 215, 362 S.E.2d 547 (1987), and Marriott received copies of the document plaintiff filed with the Wake County Clerk of Superior Court, we nonetheless hold more is required in a claim of lien affecting title to real estate which is intended to place "the world" on notice of the claim. Such notice must clearly delineate the tiered relationships in which the claimant is involved. This is so the owner may understand how the lien has arisen, and also so a title-searcher may ascertain which entities are potential claimants and how each is connected to the real estate. We hold the trial court correctly construed the statutory scheme, and that it was necessary for plaintiff to give notice in accordance with the form specified in G.S. § 44A-19.

Although a second tier subcontractor must *notice* its claim of lien using a format substantially similar to that provided in G.S. § 44A-19, *perfection of this lien is not achieved merely upon proper notice*. G.S. § 44A-23 states: "The manner of such enforcement shall be as provided by G.S. § 44A-7 through § 44A-16. The lien is perfected as of the time set forth in G.S. 44A-10 upon filing of claim of lien pursuant to G.S. 44A-12." Because this type of subrogation lien concerns real property, the claim of lien must

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also be *filed* pursuant to G.S. § 44A-12 before it is considered perfected. The relevant portions of this section, assuming compliance with the notice requirements established in G.S. § 44A-19, are the following:

(a) Place of Filing.—All claims of lien against any real property must be filed in the office of the clerk of superior court in each county wherein the real property subject to the claim of lien is located. . . .

(b) Time of Filing.—Claims of lien may be filed at any time after the maturity of the obligation secured thereby but not later than 120 days after the last furnishing of labor or materials at the site of the improvement by the person claiming the lien.

G.S. § 44A-12(a)(b).

Plaintiff filed its instrument at the place and within the time-frame indicated. However, as we have determined the notice provided by plaintiff was ineffective, the claimed lien was not perfected, and the action brought by plaintiff seeking its enforcement was fatally flawed. No genuine issue of material fact remained for trial, and the court properly ruled defendants were entitled to summary judgment as a matter of law.

II.

Plaintiff contends in its second assignment of error the trial court reversibly erred by not granting plaintiff's own motion for summary judgment, or, in the alternative, partial summary judgment. We need not address this contention, however, because our holding the court properly granted summary judgment in favor of defendants renders moot plaintiff's second assignment of error.

The order of the trial court is affirmed.

Judges JOHNSON and LEWIS concur.

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[112 N.C. App. 47 (1993)]

JOHN P. BAILEY AND WIFE, JANIE ARLENE BAILEY, PLAINTIFFS v.
NATIONWIDE MUTUAL INSURANCE COMPANY AND AETNA LIFE AND
CASUALTY COMPANY, DEFENDANTS

No. 9212SC179

(Filed 21 September 1993)

1. Insurance § 514 (NCI4th) — uninsured motorist policy — no intrapolicy stacking pursuant to policy language

The uninsured motorist policy coverages on the three separate vehicles covered by plaintiffs' auto liability insurance policy with defendant could not be stacked intrapolicy to satisfy husband's and wife's damages, even though the Financial Responsibility Act does not prohibit stacking, since the language of defendant's policy was unambiguous and straightforward and clearly did not permit the intrapolicy stacking of its UM coverage.

Am Jur 2d, Automobile Insurance §§ 326, 329.

Combining or "stacking" uninsured motorist coverages provided in single policy applicable to different vehicles of individual insured. 23 ALR4th 12.

2. Insurance § 509 (NCI4th) — uninsured motorist policy proceeds — subrogation lien held by workers' compensation carrier

Defendant Aetna, the workers' compensation carrier for plaintiff who was injured in an automobile accident while driving a truck within the course and scope of his employment, had a subrogation lien on the uninsured motorist policy proceeds in the case. N.C.G.S. §§ 97-10.2(a), (f)(1), (g) and (h).

Am Jur 2d, Automobile Insurance §§ 293, 438.

3. Insurance § 509 (NCI4th) — uninsured motorist benefits — no reduction for workers' compensation benefits

Defendant Nationwide's liability to plaintiffs for uninsured motorist benefits could not be reduced by the amount of workers' compensation benefits paid to or for the benefit of plaintiff husband by Aetna, the workers' compensation carrier.

Am Jur 2d, Automobile Insurance §§ 293, 327, 328.

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Uninsured motorist coverage: validity and effect of policy provision purporting to reduce coverage by amount paid under worker's compensation law. 24 ALR3d 1369.

4. Insurance § 509 (NCI4th) — uninsured motorist policy — damages greater than policy — issue of judgment interest inapplicable

Where plaintiffs' damages were established at an amount in excess of insurance which was available to plaintiffs under defendant Nationwide's UM policy, and plaintiffs were therefore entitled to Nationwide's total policy, the issue of judgment interest did not apply on the facts of the case.

Am Jur 2d, Automobile Insurance §§ 298, 429.

Appeal by plaintiffs-appellants and cross-notice of appeal by defendant-appellee from judgment entered 9 December 1991 by Judge E. Lynn Johnson in Cumberland County Superior Court. Heard in the Court of Appeals 2 February 1993.

Charles E. Sweeny for plaintiffs-appellants/appellees John P. Bailey and Janie Arlene Bailey.

LeBoeuf, Lamb, Leiby & MacRae, by Peter M. Foley and Stephanie Hutchins Autry, for defendant-appellant/appellee Nationwide Mutual Insurance Company.

Anderson, Broadfoot, Johnson, Pittman & Lawrence, by Lee B. Johnson, for defendant-appellee Aetna.

JOHNSON, Judge.

This case is a declaratory judgment action wherein the insurance companies involved seek to determine their obligations arising out of an accident occurring on 3 December 1987. On that date, plaintiff John P. Bailey was driving a 1986 Toyota truck within the course and scope of his employment and was involved in an accident with a 1985 Ford automobile being driven by Ronnie Guy Eaton. Plaintiffs filed suit against Eaton to recover damages for bodily damages sustained by John P. Bailey (husband) and loss of consortium suffered by Janie Arlene Bailey (wife) as a result of the accident.

Plaintiff husband was the named insured on a policy of personal automobile liability insurance issued by defendant Nationwide Mutual Insurance Company (Nationwide). The policy provided uninsured

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motorist (UM) coverage, subject to limited exclusions with a limit of liability of \$50,000.00 for bodily injury to one person. This policy was on three separate vehicles, one being the 1986 Toyota truck involved in the accident with Eaton. Plaintiff wife was a Class I insured and covered person under the policy provisions. Plaintiffs were married and living together at the address shown in the policy at the time of the accident.

Because plaintiff husband was injured during the course and scope of his employment with Southern Elevator Company, Aetna, the workers' compensation carrier for his employer, paid to or for the benefit of plaintiff husband benefits in the amount of \$28,041.73. Thereafter, defendant Nationwide tendered an amount of \$21,958.27 to plaintiff husband, reflecting the \$50,000.00 limit of liability minus the workers' compensation benefits paid by Aetna.

The Eatons failed to appear and defend the suit filed by plaintiffs; therefore, Nationwide elected to defend the suit in the name of the Eatons, pursuant to North Carolina law. North Carolina General Statutes § 20-279.21(b)(3)(a) (1992). At trial, the jury rendered a verdict in favor of plaintiffs, awarding \$96,400.00 to plaintiff husband and \$20,000.00 to plaintiff wife. Further, the trial judge ordered that a declaratory judgment be scheduled to determine the distribution of the judgment among the parties involved.

After plaintiffs filed this declaratory judgment, all parties moved for summary judgment, and the court ruled as follows:

1. In respect to the issue of intra-policy [sic] stacking . . . Defendant, Nationwide Mutual Insurance Company's, Motion for Summary Judgment, on the issue of intra-policy [sic] stacking is allowed, and the Plaintiff's Motion for Summary Judgment is DENIED.
2. In respect to the issue of Janie Bailey's loss of consortium claim . . . the Defendant, Nationwide Mutual Insurance Company's, Motion for Summary Judgment on this issue is allowed, and the Plaintiff's Motion for Summary Judgment is DENIED.
3. The Defendant, Nationwide Mutual Insurance Company's Motion to Amend, in the Court's discretion, is DENIED.
4. In respect to the issue of reduction of the amount of uninsured Motions benefits by the amount of worker's compensation benefits paid to or for the benefit of John Bailey . . .

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the Defendant, Nationwide Mutual Insurance Company, Motion Summary Judgment is DENIED and the Plaintiff's Motion for Summary Judgment is ALLOWED.

5. In view of the previous rulings and particularly with respect to the ruling affecting the loss of consortium claim, the Plaintiff's Motion for Summary Judgment for pre-judgment interest and post judgment interest as it relates to the judgment of John P. Bailey and as it relates to UM coverage is allowed. The Plaintiffs Motion for Summary Judgment for pre-judgment interest and post judgment interest as it relates to Janie Arlene Bailey judgment is DENIED.

6. [T]he Defendant, Aetna Casualty and Surety Company, is declared to have a lien on any proceeds to be paid by Nationwide Mutual Insurance Company to John P. Bailey . . . in the total sum of \$28,041.73[.]

From this judgment, plaintiffs and defendant Nationwide appeal.

I.

Summary judgment is granted when the movant has established the nonexistence of any genuine issue of fact. This showing must be made in the light most favorable to the nonmoving party and such nonmoving party should be accorded all favorable inferences that may be deduced from the showing. *Moye v. Thrifty Gas Co., Inc.*, 40 N.C. App. 310, 252 S.E.2d 837, *disc. review denied*, 297 N.C. 611, 257 S.E.2d 219 (1979).

II.

[1] Plaintiffs contend that the UM policy coverages on the three separate vehicles covered by plaintiffs' auto liability insurance policy with defendant Nationwide should be stacked intrapolicy to satisfy plaintiffs' damages. We disagree.

We note initially that our statutes address UM coverage in the Motor Vehicle Safety and Financial Responsibility Act of 1953. North Carolina General Statutes § 20-279.21(b)(3) (1992) reads:

No policy of bodily injury liability insurance . . . shall be delivered or issued for delivery in this State with respect to any motor vehicle registered or principally garaged in this State unless coverage is provided therein or supplemental thereto . . . for

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the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles and hit-and-run motor vehicles because of bodily injury . . . resulting therefrom; provided, an insured is entitled to secure additional coverage up to the limits of bodily injury liability in the owner's policy of liability insurance that he carries for the protection of third parties.

The purpose of UM coverage is to provide certain minimum financial protection to persons who are injured by financially irresponsible uninsured motorists. *Hamilton v. Travelers Indemnity Co.*, 77 N.C. App. 318, 335 S.E.2d 228 (1985), *disc. review denied*, 315 N.C. 587, 341 S.E.2d 25 (1986).

Our Supreme Court in *Lanning v. Allstate Insurance Co.*, 332 N.C. 309, 420 S.E.2d 180 (1992) compared North Carolina General Statutes § 20-279.21(b)(3), set out above, as to UM coverage, with North Carolina General Statutes § 20-279.21(b)(4), which addresses underinsured motorist (UIM) coverage. The Court recognized "that there are differences in the coverages, as evinced by the General Assembly's use of separate statutory provisions and separate language." *Id.*, at 313-14, 420 S.E.2d at 183. The Court noted that *Sutton v. Aetna Casualty & Surety Co.*, 325 N.C. 259, 382 S.E.2d 759, *reh'g denied*, 325 N.C. 437, 384 S.E.2d 546 (1989) held, based on North Carolina General Statutes § 20-279.21(b)(4), intrapolicy and interpolicy stacking was mandated for *underinsured* motorists' coverage. (Emphasis added.) However, the Court in *Sutton* went on to explain that "the General Assembly . . . has never included in subdivision (b)(3) language similar to that in subdivision (b)(4). Subdivision (b)(3) is in fact silent on the issue of stacking coverages." *Lanning*, 332 N.C. at 314, 382 S.E.2d at 183. Therefore, our Supreme Court held that the Financial Responsibility Act did not require intrapolicy stacking of UM coverages. *E.g.*, *Requeno v. Integon General Ins. Corp.*, 332 N.C. 339, 421 S.E.2d 784 (1992); *Wheeler v. Welch*, 332 N.C. 342, 420 S.E.2d 186 (1992).

Although the Act does not require stacking of UM coverage, it does not prohibit it; therefore, an examination of Nationwide's policy must be made to see if the language in the policy permits stacking. The policy reads, in pertinent part:

The limit of bodily injury liability shown in the Declarations for "each person" for Uninsured Motorists Coverage is our maximum limit of liability for all damages for bodily injury

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sustained by any one person in any one auto accident. Subject to this limit for "each person", the limit of bodily injury liability shown in the Declarations for "each accident" for Uninsured Motorist Coverage is our maximum limit of liability for all damages for bodily injury resulting from any one accident. . . . This is the most we will pay for bodily injury . . . regardless of the number of:

1. Covered persons;
2. Claims made;
3. Vehicles or premiums shown in the Declarations; or
4. Vehicles involved in the accident.

This language in Nationwide's policy is unambiguous and straightforward and it clearly does not permit the intrapolicy stacking of its UM coverage. Therefore, we find that the UM policy coverages on the three separate vehicles covered by plaintiffs' auto liability insurance policy with defendant Nationwide may not be stacked intrapolicy to satisfy husband and wife's damages.

[2] Plaintiffs next argue that defendant Aetna, the workers' compensation carrier for plaintiffs, should not have a subrogation lien on the UM policy proceeds. Aetna claims this subrogation lien based on North Carolina General Statutes § 97-10.2(a)-(h) (1991), and cites *Ohio Casualty Group v. Owens*, 99 N.C. App. 131, 392 S.E.2d 647, *disc. review denied*, 327 N.C. 484, 396 S.E.2d 614 (1990) as controlling. We agree with defendant Aetna.

Relevant provisions of North Carolina General Statutes § 97-10.2 provide:

[§ 97-10.2(a)] The right to compensation and other benefits under this Article for disability, disfigurement, or death shall not be affected by the fact that the injury . . . was caused under circumstances creating a liability in some person other than the employer to pay damages therefor, such person hereinafter being referred to as the "third party." The respective rights and interests of the employee-beneficiary under this Article, the employer, and the employer's insurance company, if any, in respect of the common-law cause of action against such third party and the damages recovered shall be as set forth in this section.

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[§ 97-10.2(f)(1)] If the employer has filed a written admission of liability for benefits under this Chapter . . . then any amount obtained by any person by settlement with, judgment against, or otherwise from the third party by reason of such injury . . . shall be disbursed by order of the Industrial Commission . . . in the following order of priority:

a. First to the payment of actual court costs taxed by judgment and/or reasonable expenses incurred by the employee in the litigation of the third-party claim.

b. Second to the payment of the fee of the attorney representing the person making settlement or obtaining judgment[.] . . .

c. Third to the reimbursement of the employer for all benefits by way of compensation or medical compensation paid or to be paid by the employer[.] . . .

d. Fourth to the payment of any amount remaining to the employee[.] . . .

* * *

[§ 97-10.2(g)] The insurance carrier affording coverage to the employer under this Chapter shall be subrogated to all rights and liabilities of the employer[.] . . .

* * *

[§ 97-10.2(h)] In any proceeding against or settlement with the third party, every party to the claim for compensation shall have a lien to the extent of his interest under (f) hereof upon any payment made by the third party by reason of such injury . . . whether paid in settlement, in satisfaction of judgment, as consideration for covenant not to sue, or otherwise and such lien may be enforced against any person receiving such funds. . . .

North Carolina General Statutes §§ 97-10.2(a), 97-10.2(f)(1), 97-10.2(g), 97-10.2(h) (1991).

Ohio Casualty Group v. Owens concerned a claim by a plaintiff employee who was injured in an automobile accident occurring while within the scope of her employment. The accident was caused by an UIM motorist, whose policy had a limit of \$25,000.00. Plaintiff sought to recover UIM benefits under her own liability policy, which had a limit of \$50,000.00. The workers' compensation carrier

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had paid \$20,392.70 thus far in benefits to or for plaintiff. Our Court held that the plaintiff was to recover a net total of \$50,000.00, and that the workers' compensation carrier had a lien on these proceeds for the \$20,392.70 already paid. Our Court said:

The Legislature's intent with regard to N.C. Gen. Stat. § 20-279.21(b)(4) is plain when it is read in conjunction with the Workers' Compensation Act. N.C. Gen. Stat. § 97-10.2 provides for the subrogation of the workers' compensation insurance carrier . . . to the employer's right, upon reimbursement of the employee, to any payment, *including uninsured/underinsured motorist proceeds*, made to the employee by or on behalf of a third party as a result of the employee's injury.

Ohio Casualty Group v. Owens, 99 N.C. App. at 134, 392 S.E.2d at 649. (Emphasis added.) Just as our Court held that the workers' compensation carrier had a lien against the UM/UIM coverage purchased by the plaintiff in *Ohio Casualty Group v. Owens*, we find that defendant Aetna has a subrogation lien on the UM policy proceeds on the case herein.

III.

[3] Defendant Nationwide argues that the trial court erred in determining that Nationwide's liability to plaintiffs for UM benefits may not be reduced by the amount of workers' compensation benefits paid to or for the benefit of plaintiff husband by Aetna. We disagree.

In *Sproles v. Greene*, 100 N.C. App. 96, 394 S.E.2d 691 (1990), *rev'd on other grounds*, 329 N.C. 603, 407 S.E.2d 497 (1991), our Court considered a case in which the plaintiffs were hurt in an automobile accident arising out of their employment and caused by a third party tortfeasor who had minimum bodily injury limits of insurance. The insurance company (USF&G) which held the UIM policy on the plaintiff driver's car attempted to have its liability reduced by monies paid to the plaintiff by her workers' compensation carrier. Our Court disallowed this, and said:

In this case USF&G's policy is not a business policy, it is a "Personal Auto Policy"; the policy was not paid for by [plaintiff's] employer, she and her husband paid for it; the workers' compensation insurance was not provided by USF&G or an affiliate; and [plaintiff's] damages have been established at an amount far in excess of any kind of insurance that is available

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to her. . . . In this case USF&G was paid to insure [plaintiff] against being damaged by a financially irresponsible motorist and while her damages by such a motorist remain unpaid USF&G's obligation to her should not be reduced or eliminated because part of her loss has been paid by someone else.

Sproles, 100 N.C. App. at 106-07, 394 S.E.2d at 697-98. *See also Ohio Casualty Group v. Owens*, 99 N.C. App. 131, 392 S.E.2d 647. *Distinguish Manning v. Fletcher*, 102 N.C. App. 392, 402 S.E.2d 648 (1991) (where automobile insurer was also workers' compensation carrier.)

Likewise, in the case *sub judice*, Nationwide's liability to plaintiffs for UM benefits may not be reduced by the amount of workers' compensation benefits paid to or for the benefit of plaintiff husband by Aetna. Plaintiffs' damages have been established at an amount in excess of insurance that is available to plaintiffs under Nationwide's UM policy, and plaintiffs are entitled to all monies due under the policy.

Nationwide also argues that the trial court abused its discretion in denying Nationwide's motion to amend its answer to allege that interpretation of North Carolina General Statutes § 20-279.21(e) not to allow Nationwide a reduction for workers' compensation benefits is a denial of Nationwide's rights to equal protection and due process as guaranteed by the United States and North Carolina Constitutions. This ruling is discretionary with the trial court, and will be overturned on appeal only if there exists an abuse of discretion by the trial judge. *House of Raeford Farms v. Raeford*, 104 N.C. App. 280, 408 S.E.2d 885 (1991). We find that the discretionary ruling by the trial judge to deny this motion did not prejudice defendant in this matter.

[4] Finally, Nationwide argues the trial court erred in concluding that Nationwide was obligated to pay pre-judgment and post-judgment interest on the judgment in John Bailey's favor against Eaton.

Plaintiffs' insurance policy with Nationwide states, as to Part B, "Liability Coverage":

We [Nationwide] will pay damages for bodily injury or property damage for which any covered person becomes legally responsible because of an auto accident. We will settle or defend, as we consider appropriate, any claim or suit asking for these

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damages. In addition to our limit of liability, we will pay all defense costs we incur. Our duty to settle or defend ends when our limit of liability for this coverage has been exhausted.

Further, there is a supplementary payments provision to Part B, "Liability Coverage", which reads:

SUPPLEMENTARY PAYMENTS

In addition to our limit of liability, we will pay on behalf of a covered person:

* * *

(3) Interest accruing after a judgment is entered in any suit we defend. Our duty to pay interest ends when we offer to pay that part of the judgment which does not exceed our limit of liability for this coverage.

* * *

(6) Other reasonable expenses incurred at our request.

As to UM coverage, however, Part D of the Nationwide policy provides:

We will pay damages which a covered person is legally entitled to recover from the owner or operator of an uninsured motor vehicle because of:

1. Bodily injuries sustained by a covered person and caused by an accident; and
2. Property damage caused by an accident.

We note that Part D of the Nationwide policy contains no supplementary payments provision.

However, Our Supreme Court in *Baxley v. Nationwide Mutual Ins. Co.*, 334 N.C. 1, 430 S.E.2d 895 (1993) held that when the insured is collecting under his own insurance company's "underinsured" policy, "the insured is *legally entitled to recover* the total amount of money that the judgment says she is entitled to recover from the tort-feasor. In this case, the judgment awarded the insured . . . compensatory damages and prejudgment interest[.] . . . [The insurance company] has promised to pay the insured all the 'damages' awarded to her, up to its policy limit." *Id.* at 7, 430 S.E.2d at 899 (*but see* Justice Meyer's dissent, noting that "[u]nder the plain

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language of the UIM coverage provisions, [the insurance company's] obligation is limited to paying damages *suffered by reason of bodily injury and property damage*. Interest cannot be said to arise from bodily injury or property damage." *Id.* at 15, 430 S.E.2d at 904.) Therefore, the insured may collect judgment and interest up to the limits of the policy.

However, we, in the case at hand, have already decided that plaintiffs' damages, having been established at an amount in excess of insurance that is available to plaintiffs under Nationwide's uninsured motorist policy, entitles plaintiffs to Nationwide's total policy. As such, this issue of judgment interest does not apply on the facts of this case.

IV.

We affirm the trial court's decision granting summary judgment to defendant Nationwide and denying summary judgment to plaintiffs on the issue of intrapolicy stacking; we affirm the trial court's decision that defendant Aetna is declared to have a lien on proceeds paid by defendant Nationwide to plaintiffs; we affirm the trial court's decision granting summary judgment to plaintiffs and denying summary judgment to Nationwide on the issue of reduction of Nationwide's UM benefits by the amount of workers' compensation benefits paid to or for the benefit of plaintiffs; and we reverse the trial court's allowance of plaintiffs' motion for summary judgment on the issue of pre-judgment and post-judgment interest.

The decision of the trial court is affirmed in part, reversed in part, and remanded.

Judges GREENE and MARTIN concur.

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[112 N.C. App. 58 (1993)]

STATE OF NORTH CAROLINA v. JOSEPH ANTHONY RICHARDSON

No. 9212SC863

(Filed 21 September 1993)

1. Criminal Law § 817 (NCI4th)— testimony admitted for corroboration—limiting instruction proper

The trial court did not err in instructing the jury that testimony “is being offered by the state to corroborate the testimony of a witness who has already testified” rather than limiting such testimony to the corroboration of certain child witnesses.

Am Jur 2d, Criminal Law §§ 855 et seq.

2. Evidence and Witnesses § 962 (NCI4th)— taking indecent liberties with minor—victims’ interviews with mental health professional—admissibility under medical treatment or diagnosis exception to hearsay rule

In a prosecution of defendant for taking indecent liberties with a minor and crime against nature, statements made by the child victims to a mental health consultant for the Child Medical Evaluation Program at the UNC Children’s Hospital were admissible under the medical diagnosis and treatment exception to the hearsay rule set forth in N.C.G.S. § 8C-1, Rule 803(4) where the witness’s interviews of the children in this case, conducted within two months of the last assault and less than four weeks from the date of the victims’ disclosures, were conducted to assist a physician who diagnosed both children as being victims of sexual trauma.

Am Jur 2d, Evidence §§ 683-686.

Admissibility of statements made for purposes of medical diagnosis or treatment as hearsay exception under Rule 803(4) of Federal Rules of Evidence. 55 ALR Fed. 689.

3. Evidence and Witnesses § 2332 (NCI4th)— taking indecent liberties with minor—general characteristics of sexually abused children—expert testimony admissible

In a prosecution of defendant for taking indecent liberties with a minor and crime against nature, the trial court did not err in admitting expert testimony concerning general

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characteristics of sexually abused children, behavioral problems in those who have been abused, and children's disclosure patterns, since the testimony could help the jury understand the behavior patterns of sexually abused children and assist it in assessing the credibility of the victims; the testimony was therefore relevant to rebut the defense that the children fabricated the abuse; and the testimony was not offered for the substantive purpose of showing that a sexual assault had occurred.

Am Jur 2d, Expert and Opinion Evidence §§ 33 et seq.

Necessity and admissibility of expert testimony as to credibility of witnesses. 20 ALR3d 684.

4. Evidence and Witnesses § 2335 (NCI4th)— taking indecent liberties with minor—expert pediatrician—testimony as to molestation—admission not error

In a prosecution of defendant for taking indecent liberties with a minor and crime against nature, the trial court did not err in admitting the testimony of a pediatrician who was qualified without objection as an expert in the area of pediatrics and diagnosis of child sexual abuse that the victims had been sexually molested.

Am Jur 2d, Expert and Opinion Evidence §§ 243 et seq.

5. Criminal Law § 730 (NCI4th)— jury instructions—reference to prosecuting witnesses as victims—no error

In a prosecution of defendant for first-degree sexual offense, first-degree rape, taking indecent liberties with a minor, and crime against nature, the trial court did not commit plain error in referring to the prosecuting witnesses as "victims" in its jury charge.

Am Jur 2d, Trial § 1123.

Appeal by defendant from judgments entered 20 March 1992 by Judge Orlando F. Hudson in Cumberland County Superior Court. Heard in the Court of Appeals 14 June 1993.

STATE v. RICHARDSON

[112 N.C. App. 58 (1993)]

Attorney General Lacy H. Thornburg, by Assistant Attorney General Ellen B. Scouten, for the State.

Appellate Defender Malcolm Ray Hunter, Jr., by Assistant Appellate Defender Mark D. Montgomery, for defendant appellant.

COZORT, Judge.

Joseph Anthony Richardson was indicted on two counts of first-degree sexual offense, two counts of first-degree rape, four counts of taking indecent liberties with a minor, and two counts of crime against nature. He was convicted of four counts of taking indecent liberties with a minor and two counts of crime against nature. He was sentenced to six consecutive ten-year prison terms. Defendant raises several issues on appeal, contesting various rulings made during the trial and instructions given to the jury. We find the defendant received a fair trial free from prejudicial error.

The State's evidence presented at trial consisted primarily of the testimony of three children who testified that the defendant had sexually abused them. Two of the children are female (S.M. and F.M.), and one is male (W.M.). W.M. and S.M. became acquainted with the defendant when W.M. was seven years old and S.M. was five years old. Defendant was the maintenance man at the Cross Creek Trailer Park where the children resided with their mother, beginning in November of 1990. Defendant often babysat for the children on Saturdays and Sundays while their mother worked as a nurses' assistant in a nursing home.

Sometime in December of 1990, W.M.'s teacher's assistant overheard W.M. making comments to other children in the class, asking whether they had heard of "boys pumping boys," or "men pumping boys." She relayed the information to W.M.'s teacher, who had also noticed that children in the class were teasing W.M. and calling him a "faggot." On 23 January 1991, W.M.'s teacher saw him crying in the hall at school. She took W.M. aside, spoke to him, and accompanied him to see Ms. Diane Sena, the school counselor.

W.M. told Ms. Sena that defendant had been forcing him to suck defendant's penis. W.M. also told Ms. Sena that he observed defendant having sex with his sister, S.M., during Christmas vacation. Ms. Sena questioned S.M., who told the counselor that defend-

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ant was "putting his private in my private." S.M. told Ms. Sena that the defendant would give her candy to engage in such activity and that she was not supposed to tell anyone. Ms. Sena contacted the children's mother and made an appointment for the children to speak with an officer from the Cumberland County Sheriff's Department. On 29 January 1991, Detective Karen Solomon interviewed both W.M. and S.M. At the interview, S.M. told Detective Solomon that defendant got on top of her, pulled his pants down, pulled her pants down, and would not let her get up. S.M. stated that defendant kissed her and put his "ding-a-ling" in her "coddie-cat." S.M. also stated that "milk" came out of defendant's "ding-a-ling," and that the "milk" landed on her stomach. Defendant warned S.M. not to tell anyone what had happened, and he gave her some candy. S.M. indicated that defendant had done this to her several times.

W.M. told Detective Solomon that defendant sucked his "ding-a-ling," and defendant tried to make W.M. suck defendant's "ding-a-ling." W.M. explained that defendant put his "ding-a-ling" in W.M.'s "butt." W.M. said "white stuff" came out of defendant's "ding-a-ling," and that this activity occurred every weekend.

The children's mother took W.M. and S.M. to the emergency room at Highsmith-Rainey Memorial Hospital on 29 January 1991. The emergency room nurse, Ms. Aline Taylor, testified that W.M. told her defendant would suck W.M.'s penis and had also put his penis in W.M.'s mouth and bottom. S.M. told the nurse that defendant hurt her by putting his "ding-a-ling" in her "cooter" and her "fanny." Dr. James Zinser, the emergency room doctor, testified that he examined both children to determine whether an emergency situation was present. He determined no emergency was present and made no physical findings of abuse.

Both W.M. and S.M. testified at trial. The testimony related by the children was consistent with what they had conveyed to Ms. Sena, Detective Solomon, and the hospital personnel. A third child, F.M., age seven, testified that defendant used to baby-sit her, and would touch her "private parts" with "his hand and his private part." Ms. Sena corroborated F.M.'s testimony. F.M. told Ms. Sena that defendant had been giving her candy to let him touch her. F.M. had to be hospitalized in Cumberland Mental Hospital, and has been placed in a behaviorally and emotionally handicapped class.

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On 22 February 1991, the children's mother took W.M. and S.M. to the clinic of the Child Medical Evaluation Program at the University of North Carolina Children's Hospital in Chapel Hill. There, a mental health consultant for the program, Ms. Janet Hadler, spoke to both children individually prior to a physical examination. Ms. Hadler made a videotape of each interview which was played for the jury. Dr. Desmond Runyan, a pediatrician and the director of the program, examined both children. He discovered physical evidence of sexual abuse in both children.

Defendant presented evidence consisting of the testimony of F.M.'s brother and two psychologists, Dr. Brad Fisher and Dr. John Warren, III. The psychologists testified regarding the suggestibility of young children. Defendant did not testify.

[1] Defendant's first contention on appeal is that the trial court erred in its instructions to the jury concerning the nature of testimony recounted by several of the State's witnesses. During testimony given by adult witnesses who had spoken with the children, defense counsel objected on hearsay grounds. Counsel asked that the admission of such testimony be limited to corroboration of the child witnesses. As the adult witnesses related versions of what they had been told by the children, the trial court gave the following instruction:

Members of the jury, the information that this witness is getting ready to relate to you is being offered by the state to corroborate the testimony of a witness who has already testified. If you find that it does corroborate that witness's testimony, then you may consider it as you would consider any other believable evidence.

Defendant argues "[b]ecause the hearsay testimony was admissible, if at all, merely to corroborate the children's testimony, the trial court erred in not properly limiting the testimony." We discern no problem with the instruction given by the trial court. The trial court gave the instruction each time the defendant requested that the testimony be admitted solely for corroborative purposes. The instruction properly informs the jury that the testimony was to be considered only for purposes of corroboration. The defendant's assignment of error is overruled.

[2] Defendant next challenges the trial court's admission of testimony by State's witnesses Ms. Aline Taylor and Ms. Janet Hadler.

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Defendant did not assert an assignment of error addressing the testimony of Ms. Taylor. According to N.C.R. App. P. 10(a), our review is limited to a consideration of those issues set out in the record on appeal. *See also, Koufman v. Koufman*, 330 N.C. 93, 408 S.E.2d 729 (1991). Defendant therefore has waived review of the issue with respect to Ms. Taylor, and we review the issue addressing only the testimony of Ms. Hadler.

Defendant contends that the testimony of Ms. Hadler, a mental health consultant who conducts child medical evaluations at the UNC Children's Hospital, should not have been admitted as substantive evidence pursuant to the hearsay exception embodied in N.C. Gen. Stat. § 8C-1, Rule 803(4). Testimony admitted under the hearsay exception for statements for the purpose of medical treatment or diagnosis is firmly rooted and presumed reliable. N.C. Gen. Stat. § 8C-1, Rule 803(4); *State v. Aguillo*, 318 N.C. 590, 350 S.E.2d 76 (1986). Defendant argues the presumption of reliability was overcome in this case. Specifically, defendant claims that Ms. Hadler's testimony was unreliable because "[t]here was no medical or psychological purpose for the interviews. Rather, they were purely designed to gather information against defendant." Defendant additionally contends that the interviews conducted by Ms. Hadler were inherently suggestive. We disagree.

Under Rule 803(4), the statements made for the purpose of medical diagnosis or treatment need not be made to medical personnel in order to be admissible. In *State v. Smith*, 315 N.C. 76, 85, 337 S.E.2d 833, 840 (1985), our Supreme Court held that statements made by the child victim to her grandmother were properly admitted as substantive evidence pursuant to Rule 803(4). In a case with facts similar to the case at bar, *State v. Jones*, 89 N.C. App. 584, 367 S.E.2d 139 (1988), this Court allowed the testimony of a social worker as coordinator for the Duke Child Protection Team to be admitted as substantive evidence under Rule 803(4). In *Jones*, the social worker conducted a two-part evaluation of the child victim consisting of a disclosure interview and a physical examination. The disclosure interview was necessary "to elicit information about the molestation for the purpose of aiding the medical examination and diagnosis of the victim's condition." *Id.* at 592, 367 S.E.2d at 145. To determine whether the examination was conducted for the purpose of treatment or diagnosis, rather than for the purpose of gathering evidence, this Court in *Jones* urged trial courts to consider the following:

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(1) whether the examination was requested by persons involved in the prosecution of the case; (2) the proximity of the examination to the victim's initial diagnosis; (3) whether the victim received a diagnosis or treatment as a result of the examination; and (4) the proximity of the examination to the trial date.

Id. at 591, 367 S.E.2d at 144 (citations omitted).

Our application of the *Jones* test to the facts in the present case leads us to the conclusion that Ms. Hadler's statements were properly admitted pursuant to Rule 803(4). The children's mother took them to the UNC Children's Hospital at the suggestion of the juvenile detective of the Cumberland County Sheriff's Department. The juvenile detective explained that the program coordinators would be able to conduct a more thorough examination of the children than that which was performed at Highsmith-Rainey Memorial Hospital. The examination occurred on 22 February 1991, within two months of the last assault and less than four weeks from the date of the victims' disclosures in January. Dr. Runyan diagnosed both children as being victims of sexual trauma. The date of the examinations took place over a year prior to trial. The interviews were conducted to assist Dr. Runyan in examining the children. We find that under the test outlined in *Jones*, the testimony of Ms. Hadler concerning the statements made to her by the children was reliable, and therefore properly admitted by the trial court as substantive evidence pursuant to Rule 803(4).

[3] In his next argument, defendant questions the relevancy of testimony given by Ms. Hadler and Dr. Runyan regarding the nature of child sexual abuse and the psychological symptoms of being molested. Defendant contends Ms. Hadler's testimony concerning general characteristics of sexually abused children, behavioral problems in those who have been abused, and children's disclosure patterns was not helpful to the jury and improperly admitted. With respect to Dr. Runyan's testimony, defendant contends his opinion that the children had been "molested" was erroneously admitted. To support his argument, defendant relies on *State v. Hall*, 330 N.C. 808, 412 S.E.2d 883 (1992); such reliance is misplaced.

In *Hall*, our Supreme Court addressed the admissibility of evidence that a victim suffered from post-traumatic stress syndrome and a conversion disorder. The Court held that where an

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expert testifies that a victim is suffering from conversion reaction, post-traumatic stress disorder or rape trauma syndrome, the testimony must be limited to corroboration of the victim only and not for substantive purposes. *Id.* at 822-23, 412 S.E.2d at 890-91. In the case below, Ms. Hadler's testimony served to explain basic characteristics of sexually abused children, reasons for children failing to report abuse to parents, and various events leading to disclosure. No testimony as to an abuse "profile" or "syndrome" was given, so the analysis set forth in *Hall* is inapplicable.

As in *State v. Kennedy*, 320 N.C. 20, 32, 357 S.E.2d 359, 366 (1987), the testimony given in this case describing general symptoms and characteristics of sexually abused children to explain the victims' behavior is not error, since "[t]he testimony . . . if believed, could help the jury understand the behavior patterns of sexually abused children and assist it in assessing the credibility of the victim." The testimony was therefore relevant to rebut the defense that the children fabricated the abuse. Furthermore, the testimony was not offered for the substantive purpose of showing a sexual assault had occurred. Prior to Ms. Hadler's testimony, the trial court gave the following limiting instruction:

THE COURT: All right. Members of the jury, the testimony that you are about to receive and any opinions of this expert witness are admitted for the sole purpose of corroborating the testimony of the alleged victims. It is not being admitted to prove that a rape or a sexual offense, in fact, occurred and you may not consider it for that purpose.

Consequently, we find no error with respect to the admission of Ms. Hadler's testimony.

[4] With respect to Dr. Runyan's testimony, defendant assigns as error the qualification of the pediatrician as an expert in "the diagnosis of child sexual abuse." Defendant also contends Dr. Runyan's testimony was not helpful to the jury. Specifically, defendant contends it was error for the trial court to allow Dr. Runyan to testify that the female victim was "molested." A review of the transcript indicates that Dr. Runyan was accepted as an expert in the area of pediatrics and diagnosis of child sexual abuse without objection. Dr. Runyan's medical opinion, based on the medical history and a physical examination of S.M. was that "sexual molestation has occurred." He similarly concluded that "sexual abuse has occurred," as to W.M. We find that Dr. Runyan's testimony and

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conclusions were helpful to the jury and not in violation of the rules of evidence. Pursuant to N.C.R. Evid. 702, an expert may testify as to an opinion where scientific, technical, or other specialized knowledge will assist the jury in understanding the evidence. An expert may testify as to the facts or data forming the basis of the opinion under N.C.R. Evid. 703. And, an expert opinion as to an ultimate issue is admissible under N.C.R. Evid. 704. We find no error with respect to the admission of Dr. Runyan's testimony into evidence.

Defendant next maintains that his right to a unanimous jury verdict was violated because the trial court instructed the jury on sexual offense, indecent liberties, and crime against nature without requiring the jury to specify which act or acts defendant committed. This issue has been specifically decided in *State v. Hartness*, 326 N.C. 561, 391 S.E.2d 177 (1990), which held such an instruction to be no error.

Next, defendant claims the trial court erred in denying his motion for the production of the victims' confidential records from the Cumberland County Mental Health Center. At a pretrial hearing, the trial court conducted an *in camera* review of the evaluations of S.M. and W.M., concluded the records contained no exculpatory value to defendant, and sealed the records for appellate review. Defendant has asked us to review the sealed records and to determine whether any of the documents would have been materially helpful to defendant in preparing his defense. We have reviewed the records thoroughly and find no exculpatory information. The trial court therefore did not err in failing to disclose the confidential records to the defendant.

[5] Finally, defendant contends the trial court erred in referring to the prosecuting witnesses as "victims" in its jury charge. Defendant failed to object at trial to the characterization of the children as "victims," and has technically waived review of this assignment of error. N.C.R. App. P. 10(b)(2). Our standard of review is therefore a plain error standard as outlined in *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983). "In deciding whether a defect in the jury instruction constitutes 'plain error', the appellate court must examine the entire record and determine if the instructional error had a probable impact on the jury's finding of guilt." *Id.* at 661, 300 S.E.2d at 378-79 (citing *United States v. Jackson*, 569 F.2d 1003 (7th Cir.), *cert. denied*, 437 U.S. 907, 57 L.Ed.2d 1137

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(1978)). We have reviewed the record and find no plain error. The word "victim" is included in the pattern jury instructions promulgated by the North Carolina Conference of Superior Court Judges and is used regularly to instruct on the charges of first-degree rape and first-degree sexual offense. Defendant cites no authority supporting his contention that such instructions violate the defendant's presumption of innocence. Moreover, defendant can point to no prejudice suffered due to the use of the pattern instructions, since he was neither convicted of first-degree rape or first-degree sexual offense, but found guilty of indecent liberties and crime against nature. The jury charge given for the latter charges does not contain the word "victim." We thus conclude that as to defendant's trial there was

No error.

Chief Judge ARNOLD and Judge MARTIN concur.

IN THE MATTER OF THE FORECLOSURE OF THE DEED OF TRUST OF
FRED C. NEWCOMB AND WIFE, CAROLYN R. NEWCOMB, GRANTOR

No. 928SC627

(Filed 21 September 1993)

1. Mortgages and Deeds of Trust § 120 (NCI4th)— foreclosure commenced but not completed—trustee entitled to partial commission

A trustee who commenced but did not complete foreclosure was entitled to a partial commission, computed under the deed of trust as five percent of the outstanding indebtedness, or \$2,515.85, rather than the \$10,000 awarded by the trial court. N.C.G.S. §§ 45-21.15(a), 45-21.20.

Am Jur 2d, Mortgages §§ 698, 923.

2. Fiduciaries § 29 (NCI4th)— deed of trust—foreclosure proceedings—attorney as trustee—right to recover legal expenses—findings required

When a trustee of a deed of trust who is also a licensed attorney performs such extraordinary services as described

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in N.C.G.S. § 32-51 in connection with a foreclosure proceeding, counsel is entitled under N.C.G.S. § 45-21.20 to an award of attorney's fees as an expense incurred with respect to the sale or proposed sale; however, to support an award of attorney's fees, the trial court should make findings as to the lawyer's skill, his hourly rate, its reasonableness in comparison with that of other lawyers, what he did, and the hours he spent, and the trial court here abused its discretion in awarding \$10,000 in legal expenses on behalf of the trustee without making the required findings.

Am Jur 2d, Mortgages §§ 625-627.**3. Mortgages and Deeds of Trust § 120 (NCI4th) — foreclosure — trustee's legal expenses and commission — waiver of right to contest — insufficiency of evidence**

Where mortgagor defaulted on a note secured by a deed of trust, trustee commenced but did not complete foreclosure, and the mortgagor satisfied the debt by selling the property at private sale, that portion of the trial court's order determining mortgagor to have waived his right to contest payment of legal expenses and commission to trustee by virtue of his signing a HUD-1 settlement form reflecting the payment of the legal fees was in error, since the court's order contained no findings of fact regarding the actual or circumstantial evidence of mortgagor's intent in signing the HUD-1 settlement form, and these findings were critical, particularly in view of indications in the record that mortgagor was acting upon advice of counsel, was faced with a deadline for proceeding under N.C.G.S. § 45-21.20, and had filed an appeal of the clerk's order approving \$10,000 as trustee's commission.

Am Jur 2d, Estoppel and Waiver §§ 154, 158; Mortgages §§ 15, 16.

Appeal by mortgagor from order entered 23 March 1992 by Judge William Z. Wood, Jr. in Greene County Superior Court. Heard in the Court of Appeals 13 May 1993.

Everett, Wood, Womble, Finan & Riddle, by J. Darby Wood, for plaintiff-appellant.

Horton, Crutchfield & Hulbert, by Robert B. Hulbert, Jr. and Karen M. Crutchfield, for trustee-appellee.

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JOHN, Judge.

Mortgagor Fred C. Newcomb (Newcomb) assigns as error the trial court's denial of his "Motion in the Cause" for remission of a portion of the commission claimed by trustee Joseph Horton (trustee) and the court's approval of \$10,000.00 as the amount of commission. For the reasons which follow, we reverse the court's order.

The facts are not in dispute. A deed of trust was executed on 30 April 1984 securing an \$80,000.00 principal indebtedness of Newcomb to Shirley Hill Post No. 94 of the American Legion. Newcomb defaulted on the note secured by the deed of trust. Foreclosure proceedings were commenced by trustee whose law firm performed services in connection with the proceedings. An initial sale was held, as well as fourteen re-sales.

Newcomb wished to satisfy the debt pursuant to N.C.G.S. § 45-21.20 (1991) and to sell the property in a private sale to Lloyd Moreen (buyer), not a party to this action. Trustee was informed by Newcomb that, as required by the statute, he would tender payment in the amount of \$50,317.04 for the outstanding debt on the deed of trust, \$1,471.70 for trustee's advertising expenses, \$41.00 for advanced court costs, and \$2,515.85, (calculated as 5% of the total indebtedness), for the trustee's commission.

Trustee agreed to the aforementioned figures, except he insisted upon a commission of \$10,000.00 to accomplish termination of the power of sale under G.S. § 45-21.20. If the claimed commission was not paid, trustee maintained the foreclosure would proceed and he would complete the sale. Newcomb, through his attorney, suggested buyer pay \$10,000.00 into the office of the Greene County Clerk of Superior Court, upon the stipulation the clerk would thereafter determine the amount of commission to which trustee was entitled. Trustee declined to accept this arrangement. Newcomb then filed a Motion in the Cause asking \$10,000.00 to be paid into trust pending a hearing before the clerk to determine the proper commission amount, and that upon such hearing, trustee's commission to be set in the amount of \$2,515.85. The clerk denied the motion and ordered \$10,000.00 be paid to trustee as commission. Newcomb thereafter appealed to the superior court.

Pending the appeal, Newcomb proceeded according to G.S. § 45-21.20 and completed the private sale. Trustee was paid

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\$10,000.00, and the property contained in the deed of trust was conveyed to buyer, whereupon trustee cancelled the deed of trust. Because of the pending appeal of Newcomb's motion, however, trustee declined to dismiss the foreclosure proceeding immediately, stating he would do so after the commission issue had been resolved.

The trial court thereafter held trustee was entitled to \$10,000.00, and that Newcomb waived his right to protest the amount by reflecting payment of \$10,000.00 on the settlement statement prepared when the property was sold to buyer. Newcomb appealed the court's order.

I.

[1] Newcomb first asserts the proper commission authorized by the applicable law and the language of the deed of trust is \$2,515.85. We agree.

In its conclusions of law, the court stated trustee, based on G.S. § 45-21.20 and the language of the deed of trust instrument, was "entitled to reimbursement for expenses incurred in the prosecution of the foreclosure, including legal expenses." It further concluded "the sum of \$10,000.00 is a fair and proper amount of Trustee's commission and legal services rendered by [trustee's law firm] in this matter."

G.S. § 45-21.20 requires the payment terminating the power of sale to include the debt obligation and "expenses incurred with respect to the sale or proposed sale" Other compensation permitted under G.S. § 45-21.20 includes "in the case of a deed of trust . . . the trustee's services under the conditions set forth in G.S. 45-21.15[.]" which provides, "[w]hen a sale has been held, the trustee is entitled to such compensation, if any, as is stipulated in the instrument." N.C.G.S. § 45-21.15(a) (1991).

The deed of trust herein differentiates between the amount of trustee commission paid when foreclosures are completed, and when foreclosures are commenced but not completed:

The proceeds of the Sale shall, after the Trustee retains his commission, be applied to the costs of sale the amount due on the note hereby accrued and otherwise as required by the then existing law relating to foreclosures. The Trustee's commission shall be five per cent of the gross proceeds of the sale or the minimum sum of \$_____, whichever is greater,

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for a completed foreclosure. In the event *foreclosure is commenced, but not completed, the Grantor shall pay all expenses incurred by Trustee and a partial commission computed on five per cent of the outstanding indebtedness or the above stated minimum sum, whichever is greater, in accordance with the following schedule, to wit: one-fourth thereof before the Trustee issues a notice of hearing on the right to foreclose; one-half thereof after issuance of said notice; three-fourths thereof after such hearing; and the greater of the full commission or minimum after the initial sale.*

(Emphasis added). Although a sale had been held below, the foreclosure in question was never completed, as Newcomb extinguished the debt before the period for upset bids had expired. "At any time before the time for upset bids has expired, foreclosure is incomplete" P. Hetrick and J. McLaughlin, *Webster's Real Estate Law in North Carolina*, § 281, p. 337-38 (3d ed. 1988).

Analyzing the deed of trust according to the directives of G.S. § 45-21.20 and G.S. § 45-21.15, it is apparent from the language of the trust instrument that \$10,000.00 exceeds the permissible amount of trustee's commission. Under the express provisions of the instrument quoted above, when foreclosure is "commenced, but not completed," trustee is entitled to a "partial commission" computed as five percent of the outstanding indebtedness or the minimum stated in the deed of trust, (whichever is greater), in accordance with the schedule provided. Because no minimum is specified in the document, the amount of commission must be computed as five percent of the outstanding indebtedness as set out in the schedule contained in the instrument.

Since an initial sale was held, the schedule provides the proper commission is "the greater of the full commission or minimum [provided in the instrument] after the initial sale." While the drafter's use of the terms "partial" and "full" commission reflects less than model clarity, it is apparent that the intended commission would be "partial" because the foreclosure was not completed, yet would be in the "full" amount appropriate under the instrument—that is, five percent of the outstanding indebtedness as no minimum is specified in the deed of trust. The outstanding indebtedness on 31 January 1992, the date Newcomb exercised his right of redemption, was \$50,371.04. Five percent of that amount is \$2,515.85, which is therefore the proper trustee's commission to be paid. According-

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ly, to the extent the trial court allowed an amount in excess of \$2,515.85 as trustee's commission, the court erred.

II.

[2] Our resolution of the amount of trustee's commission, however, does not conclude our inquiry. As previously noted, the trial court ruled trustee was entitled to reimbursement for "expenses incurred in the prosecution of the foreclosure, including legal expenses," and awarded trustee \$10,000.00 as *both* commission and compensation for legal services. We must consider, therefore, the propriety of the court's order for "legal expenses."

Again, G.S. § 45-21.20 authorizes compensation to a trustee for "expenses," and the deed of trust in question provides for payment of "all expenses incurred by Trustee." A non-lawyer trustee, such as a financial institution not maintaining in-house counsel, understandably might require legal advice and assistance in the administration of a deed of trust or in a foreclosure proceeding. Under such circumstances, the sums paid to counsel for services rendered would properly constitute an "expense" incurred by the trustee. Where the trustee is also a licensed attorney, G.S. § 32-51 provides for the allowance of:

counsel fees to an attorney serving as a . . . trustee (*in addition to the compensation allowed him as a . . . trustee*) where such attorney . . . renders professional services, as an attorney, which are beyond the ordinary routine of management and of a type which would reasonably justify the retention of legal counsel by any . . . trustee not himself licensed to practice law.

N.C.G.S. § 32-51 (1991) (emphasis added). When a trustee of a deed of trust who is also a licensed attorney performs such extraordinary services as described in this statute in connection with a foreclosure proceeding, we hold counsel is entitled under G.S. § 45-21.20 to an award of attorney's fees as an "expense[]" incurred with respect to the sale or proposed sale"

In passing on the allowance of attorney's fees pursuant to statutory authority, however, our appellate courts have consistently held a trial court's order "must contain a finding or findings upon which a determination of the reasonableness of the award can be based, such as the nature and scope of the legal services rendered and the time and skill required." *Patton v. Patton*, 78 N.C. App. 247, 258-59, 337 S.E.2d 607, 614 (1985), *rev'd in part*

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on other grounds, 318 N.C. 404, 348 S.E.2d 593 (1986); see also *Austin v. Austin*, 12 N.C. App. 286, 296, 183 S.E.2d 420, 427 (1971). "Reasonableness, not arbitrary classification of attorney activity, is the key factor under all our attorneys' fees statutes." *Coastal Production Credit Ass'n v. Goodson Farms, Inc.*, 70 N.C. App. 221, 228, 319 S.E.2d 650, 656, *disc. review denied*, 312 N.C. 621, 323 S.E.2d 922 (1984); see also N.C.G.S. §§ 6-21.1 (1986); 6-21.4 (1986); 50-13.6 (1987); 50-16.4 (1987). In *Stadiem v. Stadiem*, 230 N.C. 318, 52 S.E.2d 899 (1949), our Supreme Court said:

[t]here are so many elements to be considered in an allowance of [attorney's fees]—the nature and worth of the services; the magnitude of the task imposed; . . .—these and many other considerations are involved. On this appeal the question before us is not whether the award may not have been larger than that anticipated or even usual in cases of that kind; but whether in consideration of the circumstances under which it was made it was so unreasonable as to constitute an abuse of discretion.

Id. at 321, 52 S.E.2d at 901.

In *Barker v. Agee*, 93 N.C. App. 537, 378 S.E.2d 566 (1989), *aff'd in part, rev'd in part on other grounds*, 326 N.C. 470, 389 S.E.2d 803 (1990), this Court found sufficient findings of fact to support the award of attorney's fees under N.C.G.S. § 6-21.2 (1986) where plaintiff's attorney submitted an affidavit including billing statements showing actual work performed and the attorney's hourly rates. *Id.* at 544, 378 S.E.2d at 570-71. The trial court made findings of fact as to the reasonable amount of time required for such services and the reasonableness of the hourly rates. *Id.* at 544, 378 S.E.2d at 571. In contrast, this Court reversed an award of attorney's fees where, in the absence of supporting evidence, the court made a sole finding and conclusion that the attorney's services had a "reasonable value in excess of \$2,000." *Falls v. Falls*, 52 N.C. App. 203, 221, 278 S.E.2d 546, 558, *disc. review denied*, 304 N.C. 390, 285 S.E.2d 831 (1981). "To support an award of attorney's fees, the trial court should make findings as to the lawyer's skill, his hourly rate, its reasonableness in comparison with that of other lawyers, what he did, and the hours he spent." *Id.*

While the foregoing cases were decided under several different statutes, we hold the principles enunciated therein to be equally applicable to the case *sub judice* involving attorney's fees awarded to a trustee. An examination of the record in view of these re-

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quirements first reveals an "Affidavit of Legal Services and Expenses in Newcomb Foreclosure" which is referenced in the court's findings. In contrast with *Falls*, discussed above, where no evidence was offered in support of the award of attorney's fees, this exhibit does list services performed. Although the trial court thus had before it some evidence that legal work was done, the affidavit contains neither the amount of time required to complete each task, nor a fee or value assigned to the particular tasks or the time expended in performing them. An examination of the court's order, moreover, reveals only a recitation of the amount of the award itself and a generalized characterization of the legal assistance as being "substantial" and "fairly worth the amount of at least \$10,000.00." There are, for example, no findings regarding the nature or scope of the legal services rendered by trustee, no statement of the time and skill required to perform the tasks, nor any determination such services were either extraordinary or beyond the routine duties of one serving as named trustee in a deed of trust instrument. Compare *Coleman v. Coleman*, 74 N.C. App. 494, 498-99, 328 S.E.2d 871, 874 (1985) (the court's finding that counsel rendered "valuable legal services" held insufficient to support an award of attorney's fees) and *Brown v. Brown*, 47 N.C. App. 323, 328, 267 S.E.2d 345, 348-49 (1980) (conclusory finding that plaintiff's attorney rendered "valuable" legal services failed to qualify as a finding upon which a determination of reasonableness of \$100 fee can be based). Without appropriate findings in the court's order, including those dealing with the issue of "reasonableness," an award of counsel fees to a trustee as "legal expenses" constitutes an abuse of the court's discretion. See *Stadiem*, 230 N.C. at 321, 52 S.E.2d at 901.

Because the findings of fact and conclusions of law do not support the amount of attorneys' fees awarded as "legal expenses," therefore, we hold the court erred in its order by awarding \$10,000.00 in "legal expenses" on behalf of trustee.

III.

[3] Lastly, trustee contends the trial court's order should be affirmed because Newcomb waived his right to contest the amount paid. In its order, the court found Newcomb "signed a standard HUD-1 Settlement Sheet reflecting an item for 'Robert B. Hulbert, Jr.—Legal Services,'" and concluded "[t]hat the conduct of Fred Newcomb in the private sale of the real estate involved in this foreclosure, and the execution of a HUD-1 Settlement Sheet reflect-

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ing the payment of the [legal] fees, constitutes a waiver of the right to protest the amount of legal expenses and commission incurred by the Trustee" Although the record does reflect Newcomb signed the HUD-1 form, we decline to hold the court's single finding of this fact supports a legal conclusion of waiver.

In a non-jury trial, "determining the credibility of the witnesses and weighing [the] evidence [are] the duty and prerogative of the trial judge" *Warren v. Guttanit, Inc.*, 69 N.C. App. 103, 107, 317 S.E.2d 5, 9 (1984). Therefore, "[w]here . . . the trial judge's findings are supported by the evidence and those findings in turn support his conclusions of law, they are binding on appeal." *Lumbee River Elec. Membership Corp. v. City of Fayetteville*, 309 N.C. 726, 741-42, 309 S.E.2d 209, 219 (1983). However, the conclusions of law "must be based on the facts found by the court. A bare conclusion unaccompanied by the supporting grounds for that conclusion does not comply with G.S. 1A-1, Rule 52(a)(1)." *Appalachian Poster Advertising Co., Inc. v. Harrington*, 89 N.C. App. 476, 480, 366 S.E.2d 705, 707 (1988) (citations omitted). The supporting findings of fact are required so the appellate court can give meaningful review to the conclusions of law and "test the correctness of [the lower court's] judgment." *Id.*

"A waiver is a voluntary and intentional relinquishment of a known right or benefit. It is usually a question of intent." *Adder v. Holman & Moody, Inc.*, 288 N.C. 484, 492, 219 S.E.2d 190, 195 (1975). "The intention to waive may be expressed or implied from acts or conduct that naturally lead the other party to believe that the right has been intentionally given up. 'There can be no waiver unless it is intended by one party and so understood by the other, or unless one party has acted so as to mislead the other.'" *Klein v. Avemco Ins. Co.*, 289 N.C. 63, 68, 220 S.E.2d 595, 599 (1975) (quoting 7 Strong's N.C. Index 2d *Waiver* § 2, p. 527 (1968)).

Reviewing the court's order pursuant to the foregoing appellate and waiver principles, we observe it contains no findings of fact regarding the actual or circumstantial evidence of Newcomb's intent in signing the HUD-1 settlement statement form. These findings are critical to a legal conclusion of waiver, particularly in view of indications in the record Newcomb was acting upon advice of counsel, was faced with a deadline for proceeding under G.S. § 45-21.20, and had filed an appeal of the clerk's order approving \$10,000.00 as trustee's commission. Accordingly, because of the

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lack of sufficient findings to support the conclusion of law reciting waiver by Newcomb, that portion of the court's order determining Newcomb to have waived his right to contest payment of "legal expenses and commission" to trustee was in error.

Based on the foregoing, therefore, the order of the trial court is hereby reversed, and this cause is remanded for further proceedings not inconsistent with the opinion herein.

Reversed and remanded.

Judges WELLS and COZORT concur.

STATE OF NORTH CAROLINA v. WILLIE KIMBALL SMALLWOOD,
DEFENDANT

No. 916SC1242

(Filed 21 September 1993)

1. Criminal Law § 1133 (NCI4th)— defendant's inducement of others to commit crime—aggravating factor found—sufficiency of evidence

Evidence was sufficient to support the trial court's finding as an aggravating factor that defendant induced others to participate in the commission of the offense of trafficking in cocaine where it tended to show that defendant supplied a house with cocaine from the purchases he made in New York; undercover agents purchased cocaine directly from three people in the house, and statements made by those individuals to the agents indicated that they were selling the cocaine for defendant; a typical sale involved an agent conversing with one of the individuals of the household while defendant weighed and bagged the cocaine for sale; and defendant set the price for the crack cocaine. N.C.G.S. § 15A-1340.4(a)(1)(a).

Am Jur 2d, Criminal Law §§ 598, 599.

2. Criminal Law § 1182 (NCI4th)— conviction of crime—statutory aggravating factor found—official court record as basis

The trial court did not err in finding as a statutory aggravating factor that defendant was convicted of a criminal

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offense punishable by more than sixty days confinement, and there was no merit to defendant's contention that he was never convicted of the resisting arrest charge because the case was appealed, where the official court record of Bertie County contained no indication that the conviction for resisting arrest was ever appealed to superior court, and defendant denied neither the authenticity nor the correctness of the court record.

Am Jur 2d, Criminal Law §§ 598, 599.

3. Criminal Law § 1269 (NCI4th)— defendant's good reputation in community—failure to find mitigating factor—insufficiency of evidence

The trial court did not err in failing to find as a mitigating factor for trafficking in cocaine that defendant had a good reputation in the community in which he lived, where defendant's evidence consisted of written letters from individuals and a letter from the Program Supervisor of the prison unit where defendant was incarcerated; the letters which spoke of defendant as "a very good boy" who "got caught up with the wrong people" and who had "had some misfortune" did not go to defendant's character and reputation in the community; there was no opportunity to examine the letter writers to determine their relationship with defendant, how long they knew him, and what they knew about his activities; and it was within the trial court's discretion whether to consider defendant's conduct in prison after conviction and before his resentencing hearing. N.C.G.S. § 15A-1340.4(a)(2)(m).

Am Jur 2d, Criminal Law §§ 598, 599.

4. Criminal Law § 1060 (NCI4th)— sentencing hearing—evidence concerning codefendants—no error

The trial court did not err at defendant's resentencing hearing in allowing evidence concerning other codefendants, since formal rules of evidence do not apply at sentencing hearings, and the questioned evidence dealt directly with defendant and the circumstances surrounding the crimes of which he was convicted.

Am Jur 2d, Criminal Law §§ 598, 599.

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Appeal by defendant from judgments entered 11 September 1991 by Judge W. Russell Duke, Jr. in Bertie County Superior Court. Heard in the Court of Appeals 2 March 1993.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Thomas G. Meacham, Jr., for the State.

Taylor & McLean, by Donnie R. Taylor, for defendant-appellant.

JOHNSON, Judge.

Defendant, Willie Kimball Smallwood, was indicted by the Bertie County Grand Jury on six counts of trafficking in cocaine in violation of North Carolina General Statutes § 90-95(h)(3)(a)(1) (Cum. Supp. 1992). Defendant pled guilty to four of the trafficking counts and no contest to the other two counts. In the judgment entered 1 June 1990, defendant received the maximum sentence of fifteen (15) years each on five trafficking counts and four and one-half (4½) years on the last count for these Class G felonies. Defendant gave notice of appeal in open court to our Court; the case was remanded for resentencing.

A resentencing hearing was held on 9 September 1991 and from judgment of active sentences in excess of the presumptive term, defendant gave oral and written notice of appeal to this Court.

Evidence presented by the State tended to show that an undercover drug operation conducted by the State Bureau of Investigation (SBI) revealed that drugs were being sold out of a yellow house behind a car wash in Windsor, North Carolina. The testimony of Donald Cowan, Deputy Sheriff of Bertie County, indicated that several cocaine buys were made from this house by undercover law enforcement personnel, and at least two of those buys came directly from defendant. The remaining buys were made from three other individuals, Annetta Pugh and her children George and Angie Pugh, who also resided at the house. Further investigation revealed that it was defendant who supplied those individuals with the drugs to sell.

Special Agent Dwight Ransome of the SBI testified that defendant was one of the largest crack cocaine dealers in Bertie County and that Annetta, George and Angie Pugh (who were subsequently prosecuted and convicted) were selling the crack cocaine for defendant.

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The State introduced further evidence which showed defendant had a prior conviction of resisting arrest for which defendant received a six month suspended sentence and two years unsupervised probation. Defendant objected to this evidence, contending he was never convicted on the resisting arrest charge. Further, defendant noted the testimony of Deputy Cowan, who was in district court the day defendant was convicted. Deputy Cowan testified it was his "understanding" that notice of appeal was given. However, the official court record, to which defendant stipulated, demonstrated that no appeal was taken from the district court conviction.

Defendant further testified that although present when the undercover agents made the buys, defendant did not actually deliver or sell the cocaine to the officers. Thirteen letters on behalf of defendant's good character were introduced at the resentencing hearing.

[1] By defendant's first assignment of error, defendant contends that the trial court committed reversible error by finding as an aggravating factor that defendant induced others to participate in the commission of the offense. This contention fails.

North Carolina General Statutes § 15A-1340.4(a)(1)(a)-(p) (Cum. Supp. 1992) sets out factors the trial court may find as aggravating. In particular, § 15A-1340.4(a)(1)(a) provides as a factor that "[t]he defendant induced others to participate in the commission of the offense[.] . . ." Defendant argues that the court improperly found this factor in aggravation, and the State offered no evidence in support of this factor. The basis for defendant's argument is that the legislature, by using the word "the" in front of "offense", only intended this factor to apply to instant offenses and not prior or subsequent offenses. Defendant argues that he did not induce anyone to commit the offenses for which he was convicted. On the contrary, we find the record contains more than sufficient evidence to support this finding in aggravation.

In determining whether to impose a prison term in excess of the presumptive sentence for a Class G felony of trafficking in cocaine, "the sentencing judge must consider the statutory aggravating and mitigating factors set out in N.C.G.S. Sec. 15A-1340.4(a), and may consider other aggravating and mitigating factors if reasonably related to the purposes of sentencing." *State v. Lloyd*, 89 N.C. App. 630, 634, 366 S.E.2d 912, 915, *disc. review denied*, 322 N.C. 483, 370 S.E.2d 231 (1988); *State v. Melton*, 307

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N.C. 370, 373, 298 S.E.2d 673, 676 (1983). After each factor in aggravation or mitigation has been proven by a preponderance of the evidence, the judge, in his sound discretion, must find that the aggravating factors outweigh the mitigating factors before he can impose a term greater than the presumptive one. *Lloyd*, 89 N.C. App. 630, 366 S.E.2d 912.

Our Court has previously interpreted this particular aggravating factor by first defining the word "induce." In *State v. SanMiguel*, 74 N.C. App. 276, 281, 328 S.E.2d 326, 330 (1985), our Court referred to Black's Law Dictionary which defined "induce" as "[t]o bring on or about, to affect, cause, to influence to an act or course of conduct, lead by persuasion or reasoning, incite by motives, prevail on."

The evidence shows that defendant "induced" the involvement of Annetta, George and Angie Pugh in the sale and distribution of cocaine. Defendant supplied the house with cocaine from the purchases he made in New York. Undercover agents purchased cocaine directly from Annetta, George and Angie Pugh, and statements made by these individuals to the agents indicated that they were selling the cocaine for defendant. A typical sale involved an agent conversing with one of the three members of the household while defendant weighed and bagged the cocaine for sale. Annetta Pugh told one of the agents that defendant was the one who set the price for the crack cocaine. Clearly, defendant meant to "bring on or about" and "influence" the results of the crack cocaine sales. Accordingly, defendant's contention that he did not induce anyone to commit these trafficking offenses is unfounded.

[2] By defendant's second assignment of error, defendant contends the trial court committed reversible error in finding as a statutory aggravating factor that defendant was convicted of a criminal offense punishable by more than sixty days confinement. We disagree.

Defendant asserts he was never convicted of the resisting arrest charge because the case was appealed. Evidence of this was presented through defendant's testimony that he had not been convicted of anything, and through Deputy Cowan's testimony that on the day defendant was convicted it was his "understanding" that notice of appeal was given. However, the State presented evidence from the official court record that no appeal was taken.

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In support of his argument, defendant relies on *State v. Potts*, 65 N.C. App. 101, 308 S.E.2d 754 (1983), *disc. review denied*, 311 N.C. 406, 319 S.E.2d 278 (1984), which requires the trial court to find aggravating and mitigating factors proved by “uncontradicted and manifestly credible evidence.” Our Supreme Court gave guidance in the determination of credibility of evidence in *State v. Jones*, 309 N.C. 214, 306 S.E.2d 451 (1983), *appeal after remand*, 314 N.C. 644, 336 S.E.2d 385 (1985). In *Jones*, the Court stated it was error for a judge to “fail[] to find a statutory factor when evidence of its existence is both uncontradicted and manifestly credible.” *Id.* at 309 N.C. 220, 306 S.E.2d 456. Conversely, it would be error for a judge to find a statutory factor when it is not supported by uncontradicted and manifestly credible evidence. The Court further explained that uncontradicted evidence can more easily be determined from the record on appeal than can manifestly credible evidence. The Court noted that credibility is manifest in the instance “where the controlling evidence has been documented and the defending party does not deny the authenticity or correctness of the documents.” *Id.*

In the case *sub judice*, evidence of the conviction is presented in the official court record of Bertie County. Defendant denies neither the authenticity nor the correctness of this document. In fact, defendant stipulated that the “shuck” was the official court record which contained no indication that the conviction was ever appealed to superior court. North Carolina General Statutes § 15A-1340.4(e) (Cum. Supp. 1992) states in pertinent part that “the original . . . court record . . . shall be prima facie evidence of the facts set out therein.” Therefore, the trial court’s reliance on the official court record, which showed a prior conviction punishable by more than 60 days confinement, was not prejudicial error.

Defendant further contends that the testimony of Deputy Cowan is sufficient to disprove the prior conviction because Deputy Cowan testified that he was in the district court on the date defendant gave notice of appeal and that it was the Deputy’s “understanding” that defendant had appealed. Defendant relies on *State v. Carter*, 318 N.C. 487, 349 S.E.2d 580 (1986), which recognized that a law enforcement officer’s testimony as to his personal knowledge of a prior conviction is sufficient proof of the conviction. Defendant argues that, conversely, a prior conviction should be able to be disproved by an officer’s testimony.

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Although we recognize that a law enforcement officer's testimony as to his personal knowledge of a prior conviction is sufficient proof of the conviction, we note that there are also methods of proof enumerated by statute. See North Carolina General Statutes § 15A-1340.4(e) (1988), which reads "[a] prior conviction may be proved by stipulation of the parties or by the original or a certified copy of the court record of the prior conviction."

In the instant case, evidence of defendant's prior convictions was presented in a form authorized by statute, the official court record, stipulated to by defendant. As noted earlier, the controlling evidence (the court record) has been documented and the defending party has not denied the authenticity or correctness of this document. Further, we note that on the court record, there is a box to be marked to indicate that "[t]he defendant gives notice of appeal from the judgment of the District Court to the Superior Court", and that this box has not been marked. We also question why this "notice of appeal" which never developed was not questioned by defendant (or his counsel at the district court conviction) earlier. Therefore, we find the evidence to be sufficient that the trial court did not err in finding the prior conviction as an aggravating factor.

[3] By defendant's third assignment of error, defendant contends the trial court committed reversible error in failing to find as a mitigating factor that defendant has a good reputation in the community in which he lives. North Carolina General Statutes § 15A-1340.4(a)(2)(m) (Cum. Supp. 1992). Defendant's evidence consisted of written letters from signed individuals and a letter from the Program Supervisor of the prison unit where defendant is incarcerated.

In *State v. Blackwelder*, 309 N.C. 410, 306 S.E.2d 783 (1983), the defendant argued that the trial court failed to find as a mitigating factor that the defendant had a good reputation in the community in which he lived. The defendant's evidence in *Blackwelder* was in the form of numerous live witnesses who testified that the defendant always paid his bills and that defendant did not get violent when he had been drinking. The Court opined:

[T]he testimony, taken in its entirety, simply failed to prove by a preponderance of the evidence the existence of this factor—that defendant has been a person of good character or has had a good reputation in the community. The failure here is on the part of the defendant in attempting to substitute

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the quantity of the evidence for the quality of the evidence. . . . [U]ncontradicted, quantitatively substantial, and credible evidence may simply fail to establish, by a preponderance of the evidence, any given factor in aggravation or mitigation.

Id. at 419, 306 S.E.2d at 789. We find the same result on our case herein. Defendant presented numerous letters from various persons stating defendant was "a very respectable person all his life," that "he has had some misfortune," that he was known as "a very good boy," that "he got caught up with the wrong people," and so on. These statements simply do not go to defendant's character and reputation in the community. Further, there was no opportunity to examine these persons to determine their relationship with defendant, how long they knew defendant, and what they knew about defendant's activities.

Additionally, the trial court did not err in not finding as a non-statutory factor the letter as to defendant's character from defendant's Program Supervisor at Washington Correctional Center. "[A] trial court may, in its discretion and upon proper proof, consider a defendant's conduct while in prison during the interval between his initial incarceration after conviction and any resentencing hearing in setting his new term of imprisonment." *State v. Swimm*, 316 N.C. 24, 32-33, 340 S.E.2d 65, 71 (1986). We find no abuse of discretion by the trial judge as to this finding.

[4] By defendant's last assignment of error, defendant contends the trial court committed reversible error in allowing irrelevant and prejudicial evidence concerning other co-defendants. We note that formal rules of evidence do not apply at sentencing hearings. North Carolina General Statutes § 15A-1334(b) (1988). Because we find this evidence dealt directly with defendant and the circumstances surrounding the crimes of which he was convicted, we find this argument is without merit.

The decision of the trial court is affirmed.

Judges LEWIS and JOHN concur.

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[112 N.C. App. 84 (1993)]

BARBARA C. FRUGARD, PLAINTIFF v. CALVIN LEE PRITCHARD, WILLIAM MASTORAS, T/A M & M PRODUCE COMPANY, DANIEL FOSTER, AND WILSON PEST CONTROL COMPANY, INC., DEFENDANTS

No. 9221SC121

(Filed 21 September 1993)

1. Automobiles and Other Vehicles § 359 (NCI4th)— motorist with green light— failure to maintain proper lookout— sufficiency of evidence

In an action to recover for injuries sustained by plaintiff pedestrian when defendants collided with each other at a city intersection, the evidence was sufficient to be submitted to the jury on the issue of defendant Foster's failure to maintain a proper lookout where it tended to show that he was stopped at a red light; he was waving at an individual in a taxi cab when the light turned green; defendant continued to look to his right in the direction of the taxi cab even as he proceeded to enter into the intersection; and defendant failed to see defendant Pritchard entering the intersection from his left against a red light.

Am Jur 2d, Automobiles and Highway Traffic §§ 233, 245.

2. Automobiles and Other Vehicles § 440 (NCI4th)— applicability of respondeat superior—agency admitted— negligent entrustment theory irrelevant

In an action by plaintiff pedestrian to recover for injuries sustained when defendants collided at a city intersection, the trial court properly struck the crossclaim of two defendants against a third for negligent entrustment, since, if the allegations of a complaint are based both on the doctrine of respondeat superior and negligent entrustment and the agency relationship is admitted, as it was in this case, the liability of the defendant employer would rest on the doctrine of respondeat superior only and the negligent entrustment allegation would become irrelevant and prejudicial.

Am Jur 2d, Automobiles and Highway Traffic §§ 643-646.

Property of allowing person injured in motor vehicle accident to proceed against vehicle owner under theory of negligent entrustment where owner admits liability under another theory of recovery. 30 ALR4th 838.

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[112 N.C. App. 84 (1993)]

3. Damages § 56 (NCI4th); Courts § 143 (NCI4th)— personal injury action—amount of workers' compensation benefits recovered in another state—North Carolina law governs admissibility

In an action by plaintiff pedestrian to recover for injuries sustained when defendants collided at a city intersection, the trial court erred in excluding evidence of workers' compensation benefits recovered by plaintiff in Virginia, since the provisions of N.C.G.S. § 97-10.2(e), providing that the amount of workers' compensation benefits paid on account of an injury shall be admissible in any proceeding against the alleged tortfeasor, govern in all actions by a plaintiff employee against a third party as a matter of law in North Carolina, even where plaintiff has recovered workers' compensation under the workers' compensation laws of another state.

Am Jur 2d, Damages § 56.

Appeal by defendants from judgment entered 23 August 1991 by Judge Julius A. Rousseau in Forsyth County Superior Court. Heard in the Court of Appeals 6 January 1993.

This is a civil action in which plaintiff Barbara Frugard, a Virginia resident, seeks to recover damages for personal injury caused by the negligent acts of defendants, Calvin Pritchard (Pritchard), William Mastoras, t/a M & M Produce Company (Mastoras), Daniel Foster (Foster), and Wilson Pest Control Company (Wilson).

Clark & Stant, P.C., by Stephen C. Swain, for plaintiff Barbara C. Frugard.

Petree Stockton & Robinson, by Richard J. Keshian, for defendant William Mastoras, t/a M & M Produce Company.

Tuggle Duggins & Meschan, P.A., by J. Reed Johnston, Jr. and Denis E. Jacobson, for defendant William Mastoras, t/a M & M Produce Company.

Womble Carlyle Sandridge & Rice, by Richard T. Rice and Clayton M. Custer, for defendants Daniel Foster and Wilson Pest Control Company, Inc.

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JOHNSON, Judge.

Plaintiff initially filed a complaint on 3 August 1988. After taking a voluntary dismissal, plaintiff refiled her complaint on 20 March 1990 and alleged the following: That between 7 and 9 November 1987, plaintiff was attending a cosmetologist convention in Winston-Salem, North Carolina; that on 9 November 1987, plaintiff was a pedestrian lawfully standing on the northwest corner of the intersection of North Cherry Street and West Fifth Street in the city of Winston-Salem, North Carolina; that at that time and place, Pritchard was operating a 1978 Ford stationwagon in the scope of his employment with Mastoras traveling in a northern direction; that at that time and place, Foster was operating a vehicle owned and operated by Wilson traveling in a westerly direction on West Fifth Street; and that then and there defendants negligently and carelessly collided with each other and the vehicle operated by Pritchard struck plaintiff causing her serious and permanent injuries.

In addition, plaintiff alleged that Pritchard and Foster were negligent in that they failed to keep and maintain a proper lookout. Plaintiff also alleged that Pritchard and Foster violated several statutes, municipal codes and ordinances.

All defendants filed answers in a timely manner. Crossclaims were filed by defendants Foster and Wilson against (1) defendants Pritchard and Mastoras for negligence, and (2) defendant Mastoras for negligent entrustment. On 8 July 1991, defendant Mastoras made a motion to strike the second crossclaim filed by defendants Foster and Wilson pursuant to North Carolina General Statutes § 1A-1, Rule 12(f) (1990). The motion was granted by the trial court.

On 15 July 1991, the case proceeded to trial in Forsyth County Superior Court with Judge Julius A. Rousseau presiding. The jury found all defendants negligent and awarded plaintiff \$700,000. The motion of defendants Foster and Wilson for judgment notwithstanding the verdict or for new trial was denied. Defendants Foster and Wilson gave timely notice of appeal.

[1] By the first assignment of error, defendants Foster and Wilson contend that the trial court erred in not granting defendants' motion for directed verdict and judgment notwithstanding the verdict. We disagree.

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In considering a motion for directed verdict and a motion for judgment notwithstanding the verdict, all evidence which tends to support the plaintiff's claim must be taken in the light most favorable to the plaintiff, giving plaintiff the benefit of every reasonable inference which may legitimately be drawn therefrom. *Farmer v. Chaney*, 292 N.C. 451, 233 S.E.2d 582 (1977); *Summey v. Cauthen*, 283 N.C. 640, 197 S.E.2d 549 (1973). All conflicts in the evidence are to be resolved in plaintiff's favor, and all evidence by defendants tending to show a situation or course of events contrary to that shown by plaintiff's evidence is to be disregarded. *Hill v. Shanks*, 6 N.C. App. 255, 170 S.E.2d 116 (1969).

Plaintiff's evidence tends to show that: On 9 November 1987, plaintiff was standing on the northwest corner of the intersection of Cherry Street and Fifth Street in downtown Winston-Salem. Pritchard, working within the scope of his employment at Mastoras, was traveling on Cherry Street in the middle lane in excess of the posted speed. Foster, working within the scope of his employment for Wilson, had been stopped in the middle lane of Fifth Street at a red stop light. Foster pulled up through the crosswalk to the corner of Cherry Street and Fifth Street while waiting for the light to change. While Foster was stopped at the light, he looked to his right and waved to Melvin Nesbitt who was standing on the northeast corner of the intersection to Foster's right. While stopped at the intersection, Foster also looked to his right and waved to the driver of a taxi cab who was in the right hand lane of Fifth Street and who was preparing to make a right hand turn from Fifth Street onto Cherry Street. After Foster's light turned green, he continued to look to his right in the direction of the driver of the taxi cab and proceeded into the intersection. At the time Foster proceeded into the intersection, there was nothing to obstruct his vision of Pritchard's vehicle had Foster looked to his left. Approximately two seconds before the impact of the accident, William Crawford, Jr., who was parked on the far left hand side of Fifth Street, facing in the same direction as Foster, heard squalling tires. Pritchard did not stop for the red light in his direction. Pritchard entered the intersection and attempted to avoid Foster's vehicle by swerving around it, but Foster hit the Pritchard vehicle on the passenger's side. The collision occurred in the middle of the intersection. As a result of the collision, the Pritchard vehicle struck plaintiff who was standing on the sidewalk on the northwest corner of the intersection, proximately causing her serious and permanent injuries.

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A motorist facing a green light when entering an intersection is under the obligation to maintain a proper lookout, in such manner as not to endanger or be likely to endanger others on the highway. *Jones v. Schaffer*, 252 N.C. 368, 375, 114 S.E.2d 105, 110 (1960). "It is the duty of the driver of a motor vehicle not merely to look, but to keep an outlook in the direction of travel; and he is held to the duty of seeing what he ought to have seen." *Wall v. Bain*, 222 N.C. 375, 379, 23 S.E.2d 330, 333 (1942).

While ordinarily a driver may proceed on a green or 'go' light or signal, he may not rely blindly thereon but should exercise due care as to others who may be in the intersection. . . . Even so, a green light is a signal for motorist to proceed; and if, when he starts forward in response to the green light, no other vehicle is then within the intersection or approaching the intersection within the range of his vision under circumstances sufficient to put him on notice that it is not going to stop in obedience to the red light, his primary obligation thereafter is to keep a proper lookout in the direction of his travel (citation omitted).

Schaffer, 252 N.C. at 375, 114 S.E.2d at 111. "Nevertheless, in the absence of anything which gives or should give him notice to the contrary, a motorist has the right to assume and to act on the assumption that another motorist will observe the rules of the road and stop in obedience to a traffic signal." *Id.* at 275, 114 S.E.2d at 110.

Although defendant Foster had the green light, it was his primary obligation to keep a proper lookout in the direction he was traveling. The witnesses provided by plaintiff established that defendant Foster was waving at an individual in a taxi cab when the light turned green. The evidence further established that defendant Foster continued to look to his right in the direction of the taxi cab even as he proceeded to enter into the intersection. We find there was sufficient evidence to take the case to the jury on defendant Foster's failure to maintain a proper lookout. The trial court was correct when it denied defendants' motions for directed verdict and judgment notwithstanding the verdict.

By the second assignment of error, defendants Foster and Wilson contend that the trial court erred in striking defendants' second crossclaim against defendant Mastoras for negligent entrustment. We disagree.

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[2] In the second crossclaim, defendants Foster and Wilson asserted a claim of negligent retention and negligent entrustment directly against defendant Mastoras. On the first day of trial, the trial judge allowed defendant Mastoras' motion to strike the second crossclaim. Defendant Mastoras' motion to strike was based on his assertion that if he was liable at all, his liability rested solely on the doctrine of respondeat superior because defendant Pritchard was acting in the scope of his employment at the time of the accident. Defendants Foster and Wilson allege they were prejudiced by the ruling of the trial court because they were entitled to prove that the active, independent negligence of defendant Mastoras combined and concurred with the negligence of the other actively negligent tortfeasors (defendants Pritchard and Foster) to produce the injuries sustained.

Negligent entrustment is applicable only when the plaintiff undertakes to impose liability on an owner *not otherwise responsible* for the conduct of the driver of the vehicle. *Heath v. Kirkman*, 240 N.C. 303, 307, 82 S.E.2d 104, 107 (1954) (emphasis added). If the allegations of a complaint are based both on the doctrine of respondeat superior and negligent entrustment and the agency relationship is admitted, the liability of the defendant employer would rest on the doctrine of respondeat superior only and the negligent entrustment allegation would become irrelevant and prejudicial. *Id.*

There has only been one limited exception to the rule of law that negligent entrustment is irrelevant and prejudicial when an agency relationship has been admitted. In *Plummer v. Henry*, 7 N.C. App. 84, 171 S.E.2d 330 (1969), the Court allowed an exception to the general rule where the issue of negligent entrustment was relevant in a claim for punitive damages based on the wilful and wanton entrustment of a vehicle to a person likely to endanger the safety of others.

In the instant case, neither plaintiff, defendant Mastoras nor defendant Pritchard at any time disputed the agency relationship between defendants Mastoras and Pritchard. In fact, the agency relationship between defendants Mastoras and Pritchard was admitted in defendant Mastoras' answer. Additionally, there were no allegations in the crossclaim that defendant Mastoras wilfully and wantonly entrusted the vehicle to defendant Pritchard knowing that he would endanger the lives of others. As we have determined

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that an agency relationship was admitted by defendant Mastoras, and that the exception outlined by the Supreme Court is inapplicable to this case, we find that the trial court was correct in striking defendants' second crossclaim.

[3] In the last assignment of error, defendants Foster and Wilson, and defendant Mastoras, in his cross-assignment of error, contend that the trial court erred in excluding evidence of workers' compensation benefits by plaintiff. We agree.

Plaintiff argues that Virginia's Workers' Compensation Act should apply as substantive law and that the Virginia Code § 65.2-309 (Repl. Vol. 1991) should apply procedurally. The Virginia Code § 65.2-309 provides that "[t]he amount of compensation paid by the employer or the amount of compensation to which the injured employee or his dependents are entitled *shall not be admissible as evidence* in any action brought to recover damages." (Emphasis added.)

Defendants Foster, Wilson and Mastoras argue that North Carolina's Workers' Compensation Statute should apply substantively and that North Carolina General Statutes § 97-10.2(e) (1991) should apply procedurally. North Carolina General Statutes § 97-10.2(e) provides in pertinent part:

[T]he amount of compensation and other benefits paid or payable on account of such injury or death *shall be admissible in evidence* in any proceeding against the third party. In the event that said amount of compensation and other benefits is introduced in such a proceeding the court shall instruct the jury that said amount will be deducted by the court for any amount of damages awarded to the plaintiff. (Emphasis added.)

This case presents a conflict of laws question as to whether Virginia's or North Carolina's substantive and procedural law apply. The North Carolina Supreme Court recently addressed a conflict of laws question on the issue of workers' compensation. *Braxton v. Anco Electric, Inc.*, 330 N.C. 124, 409 S.E.2d 914 (1991). In *Braxton*, the plaintiff worked for a North Carolina corporation but was injured on a construction site in Virginia. The plaintiff was suing a third party for personal injuries. The defendant argued that Virginia's Workers' Compensation Act was applicable and barred the plaintiff's claim. The plaintiff argued that North Carolina's Workers' Compensation Statute was applicable and should allow

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the action by the plaintiff. The Court, in determining which law should apply, reasoned that because the plaintiff's employment was under a North Carolina contract, with a North Carolina employer and embraced within the terms of the Workers' Compensation Act in North Carolina, that his contract of employment was entirely foreign to the state of Virginia's Workers' Compensation Act. Accordingly, the Court concluded that North Carolina's Workers' Compensation Statute applied.

In the instant case, plaintiff's place of business is in Virginia and embraced within the terms of Virginia's Workers' Compensation Act so that her employment is entirely foreign to North Carolina's Workers' Compensation Statute. Virginia's Workers' Compensation Act therefore governs the substantive law to be applied.

In procedural matters, however, it is well-established law that the law of the forum (*lex fori*), North Carolina in the instant case, controls all matters pertaining to procedure and remedy. *Transportation, Inc. v. Strick Corp.*, 283 N.C. 423, 196 S.E.2d 711 (1973). Moreover, a federal district court in North Carolina has specifically addressed the procedural conflict of laws issue on the admissibility of workers' compensation benefits when the workers' compensation benefits were recovered under another state's workers' compensation statute. *Geiger v. Guilford Coll. Comm. Volunteer Firemen's*, 668 F. Supp. 492 (M.N.D.C. 1987). The provisions of North Carolina General Statutes § 97-10.2(e) govern in all actions by a plaintiff employee against a third party as a matter of law in North Carolina, even where plaintiff has recovered workers' compensation under the workers' compensation laws of another state. *Geiger*, 688 F. Supp. at 496. Accordingly, the workers' compensation benefits received by plaintiff should have been allowed into evidence pursuant to North Carolina General Statutes § 97-10.2(e). As such, we find the trial court incorrectly applied Virginia procedural law committing prejudicial error.

For the foregoing reasons, we find no error on the issue of liability; we reverse and remand for a new trial on the issue of damages.

Judges GREENE and MARTIN concur.

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[112 N.C. App. 92 (1993)]

JAMES A. KING, II, PLAINTIFF v. VIVIAN R. KING, DEFENDANT

No. 9210DC950

(Filed 21 September 1993)

Divorce and Separation § 132 (NCI4th)— stock in family-owned company—outright purchase with loan proceeds—stock classified as marital property—gifts to repay loan—classification not affected

The trial court properly classified stock in a family-owned business as entirely marital property where the stock was purchased outright by plaintiff with proceeds from a loan made by his mother rather than over time; the purchase occurred during the marriage and the debt incurred to purchase the stock was a marital debt; all property acquired during the course of the marriage and before the date of separation is presumed to be marital property under N.C.G.S. § 50-20(b)(1); payments made on the marital debt during the marriage with plaintiff's separate property should not translate into separate stock ownership under the source of funds approach; and gifts from plaintiff's parents for the purpose of reducing the debt did not alter the classification of the stock itself as marital property.

Am Jur 2d, Divorce and Separation §§ 901, 902.

Appeal by plaintiff from Order entered 8 June 1992 by Judge L.W. "Mike" Payne in Wake County District Court. Heard in the Court of Appeals 9 July 1993.

Wyrick, Robbins, Yates & Ponton, by Robert A. Ponton, Jr. and Bruce C. Johnson, for plaintiff-appellant.

Rosen & Robbins, P.A., by Gerald K. Robbins and Lee S. Rosen, for defendant-appellee.

LEWIS, Judge.

Plaintiff and defendant were married in September 1973, and lived together as husband and wife until their separation in August 1988. On 7 November 1989 plaintiff filed a complaint against defendant seeking an absolute divorce and equitable distribution. After a trial on 6 and 8 November 1990, and closing arguments on 6

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January 1992, the trial court entered an Equitable Distribution Judgment on 8 June 1992. Plaintiff now appeals, alleging the court erred in its classification of certain stock as entirely marital property. Plaintiff claims the stock in his family company, the Garland C. Norris Company (hereafter "GCN"), should have been classified as part marital and part separate property.

Plaintiff's maternal grandfather, Garland C. Norris, founded GCN, and owned and managed it until he died in 1980. While alive he expressed his wish that the company remain a family company, to be managed first by his son-in-law, plaintiff's father, and then his grandchildren. In his will Mr. Norris directed that the company stock be placed in trust with his two daughters as the initial beneficiaries, and his grandchildren as the ultimate beneficiaries. Plaintiff's father was appointed trustee and assumed management of the business upon the death of Mr. Norris.

In the spring of 1982 plaintiff's father decided to involve two of his sons, plaintiff and his brother, in the management of the business. As part of this process, GCN was dissolved and a new company was created, also called the Garland C. Norris Company. The new GCN acquired all the liabilities and assets, trade name and good will of the old GCN in exchange for a \$908,000 promissory note, which was placed in the above-mentioned trust. Plaintiff and his brother each received 24,000 shares of voting common stock, and their father received 52,000 shares of preferred nonvoting stock, thereby maintaining complete control of the company.

The acquisition of these shares of stock by plaintiff, his father and his brother, was financed through a loan from plaintiff's mother, using money from the trust income. Plaintiff and his brother each received \$24,000, and plaintiff's father received \$52,000. Plaintiff paid the money to GCN in exchange for the stock, and gave his mother a promissory note for \$24,000 plus 12 percent annual interest.

Using his earnings from GCN, plaintiff began paying off the note, and by 1 June 1987 the balance due had been reduced to \$16,200. On 19 June 1987 plaintiff's father gave him \$10,000 to use specifically to pay his mother to reduce his indebtedness on the note. Plaintiff gave the money to his mother and thereby reduced the debt to \$6,200. The promissory note was reissued for that amount, and plaintiff continued to make payments. From June 1987 to January 1988 the company was restructured for tax purposes into a subchapter "S" corporation, and plaintiff's father gave

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up his stock to plaintiff and plaintiff's brother, but maintained control of the company through a voting trust agreement.

In February 1988 plaintiff's mother forgave the remaining indebtedness of both plaintiff and his brother. The accompanying note to plaintiff contained the notation, "Happy birthday." Testimony from plaintiff's mother and father indicated this action was intended to give plaintiff and his brother an ownership interest in the company free from debt and the need to use earnings to pay off that debt.

In its Equitable Distribution Judgment the trial court ruled that plaintiff received "absolute ownership of the stock free and clear of any encumbrances" on 24 June 1982. The court found that "[f]or Equitable Distribution purposes [the \$24,000] loan was a marital debt because it was procured for the benefit of the marital estate," and "regardless of the intent of the donor, the effect of [the transfer of \$10,000 to plaintiff from his father] between Plaintiff and Defendant was to reduce the amount of marital indebtedness." The court also found that "[t]he funds used by Plaintiff to make this payment [to his mother] were gifted to the Plaintiff by his father. . . . Regardless of the intent of the donor, the effect of this transaction as between Plaintiff and Defendant was to reduce the amount of marital indebtedness." The court noted that "[o]n February 19, 1988 Plaintiff's mother forgave the remaining amount due . . . on the note from Plaintiff to his mother," but did not comment on the effect of this transaction. In its distribution of the marital property the trial court awarded plaintiff all of the GCN stock, valued at \$413,000.

On appeal plaintiff argues the court erred in classifying the stock as entirely marital property. Instead of viewing the stock as acquired on the day it was paid for with the borrowed money, plaintiff argues the court should look to how that debt was paid off over time. Plaintiff agrees that the portion of the debt paid for with money earned "during the pendency of the marriage" is a marital asset. However, according to plaintiff, those portions of the debt paid for with his separate money should translate into a corresponding degree of separate ownership in the stock. Plaintiff argues that the amount of stock acquired "through the generosity of his parents in forgiving the debt were gifts" and therefore his separate property.

Defendant contends that the payment from plaintiff's father to plaintiff was a gift to the marital estate, arguing that no evidence

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indicated otherwise. Defendant argues the issue is whether or not plaintiff intended the \$10,000 he received from his father to be a gift from plaintiff to the marital estate. According to defendant, the payment of this money to plaintiff's mother was a payment from the marital money for a marital debt. Defendant also relies on the lack of any evidence in the record indicating that plaintiff's mother did not intend a gift to the marital estate when she forgave the remaining balance of the debt. Finally, defendant points out that the trial court treated the acquisition of the stock and assumption of the debt as two separate transactions. Plaintiff paid for the stock in full at the outset. According to defendant, "[t]he fact that Plaintiff also agreed to undertake some debt in this family owned business does not mean as a matter of law that this Court or that the trial court must deal with the debt and stock indistinguishably."

At the outset we note that the Record on appeal does not include a complete copy of the judgment rendered by the trial court. The court's Equitable Distribution Judgment begins on page 70 of the Record and ends on page 86, in the middle of a sentence. Only the first 17 pages of the trial court's decision are presented for our review. According to Rule 9 of the North Carolina Rules of Appellate Procedure, the Record on appeal should include a copy of the judgment from which the appeal is taken. N.C.R. App. Proc. 9(a)(1)h. (1993). We note, however, that that portion of the judgment relevant to the issues raised on this appeal are included in the Record, specifically on pages 78 and 79. Thus, we have decided the issues according to the information contained in the Record before us. We do not find that this omission constitutes a substantial failure to comply with the appellate rules in this case, and therefore decline to impose sanctions. N.C.R. App. Proc. 25(b) (1993).

In an equitable distribution proceeding the trial judge must classify all property, assets and liabilities of the parties existing on the date of separation as either separate or marital. *McLean v. McLean*, 323 N.C. 543, 545, 374 S.E.2d 376, 378 (1988). The marital property must then be distributed between the parties equally, unless the court determines an equal division would be inequitable, and the separate property remains unaffected by the proceedings. *See id.* According to section 50-20 of the North Carolina General Statutes, marital property includes

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all real and personal property acquired by either spouse or both spouses during the course of the marriage and before the date of the separation of the parties, and presently owned, except property determined to be separate property It is presumed that all property acquired after the date of marriage and before the date of separation is marital property except property which is separate property

N.C.G.S. § 50-20(b)(1) (Cum. Supp. 1992). Separate property is defined as

all real and personal property acquired by a spouse before marriage or acquired by a spouse by bequest, devise, descent, or gift during the course of the marriage. However, property acquired by gift from the other spouse during the course of the marriage shall be considered separate property only if such an intention is stated in the conveyance. Property acquired in exchange for separate property shall remain separate property regardless of whether the title is in the name of the husband or wife or both and shall not be considered to be marital property unless a contrary intention is expressly stated in the conveyance.

§ 50-20(b)(2).

The presumption in favor of marital property set forth in subsection (b)(1) was a legislative amendment effective 1 October 1991 to "actions for equitable distribution pending or filed on or after that date" § 50-20 note. The present action was filed in November 1989, but not decided until June 1992. Because it was pending in October 1991, the legislative amendment applies to this case and we must apply the presumption. The presumption may be rebutted by the greater weight of the evidence. § 50-20(b)(1).

In this case the property in question, the stock, was acquired outright on 24 June 1982 because plaintiff paid the company in full on that date. Since all of the stock at issue was acquired during the marriage by one of the spouses, before the date of separation, and is presently owned, it is presumed to be marital. See *Ciobanu v. Ciobanu*, 104 N.C. App. 461, 465-66, 409 S.E.2d 749, 752 (1991) (party claiming property to be marital must show by preponderance of evidence that it meets statutory definition). Furthermore, we conclude plaintiff has not rebutted this presumption with any evidence that the stock was acquired by "bequest,

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devise, descent, or gift during the course of the marriage," or in exchange for separate property. *See id.* at 466, 409 S.E.2d at 752 (party claiming property to be separate must show by preponderance of evidence that it meets statutory definition of separate property).

Although the stock meets the definition of marital property, plaintiff argues that application of the source of funds analysis reveals that the stock is partly marital and partly separate. *See Wade v. Wade*, 72 N.C. App. 372, 382, 325 S.E.2d 260, 269, *disc. rev. denied*, 313 N.C. 612, 330 S.E.2d 616 (1985) (adopting source of funds approach to classification of property); *Smith v. Smith*, No. 9126DC1287, 1993 WL 315005, at 3-9 (N.C. App. Aug. 17, 1993) (discussing *Wade* and the source of funds approach). Under this analysis, assets purchased with part marital and part separate funds are considered mixed property for the purposes of equitable distribution. *See Wade*, 72 N.C. App. at 382, 325 S.E.2d at 269; *Smith*, 1993 WL 315005, at 7-9.

In the case at hand the trial court found that plaintiff incurred a marital debt to purchase the stock. Plaintiff argues, however, that payments made on that debt during the marriage with his separate property should translate into separate stock ownership under the source of funds approach. Assuming that plaintiff did use his separate money to pay part of the loan, we find no merit to his argument that he is entitled to corresponding separate ownership in the stock. If the stock itself had been paid for over time, partly with separate contributions from plaintiff, plaintiff may have been entitled to a proportionate share of the stock as his separate property under the source of funds approach. *See Tiryakian v. Tiryakian*, 91 N.C. App. 128, 370 S.E.2d 852 (1988) (husband received interest in car acquired during marriage proportionate to his contributions of separate money towards car loan). In the case at hand, however, the stock was paid for in full at the beginning. The debt to plaintiff's mother, although incurred for the purpose of purchasing the stock, was a separate transaction. Gifts from plaintiff's parents for the purpose of reducing this debt do not alter the classification of the stock itself as marital property.

We conclude the source of funds analysis does not apply to the facts of this case, and affirm the trial court's conclusion that the stock was marital property. Because we resolve this issue in

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defendant's favor, we find it unnecessary to address the procedural arguments raised in defendant's brief.

Affirmed.

Judges GREENE and MARTIN concur.

NAEGELE OUTDOOR ADVERTISING, INC., PETITIONER v. THOMAS J. HARRELSON, AS SECRETARY OF TRANSPORTATION OF THE STATE OF NORTH CAROLINA, RESPONDENT

No. 9210SC913

(Filed 21 September 1993)

Highways, Streets, and Roads § 32 (NCI4th) — temporary exposure of junkyard to view — unzoned area commercial — outdoor advertising permissible

The temporary exposure of a junkyard to view by highway construction work was sufficient to render an unzoned area commercial for the purposes of the Outdoor Advertising Control Act even though the junkyard would eventually have to be screened from view or removed under the Junkyard Control Act. Therefore, plaintiff was entitled to permits for outdoor advertising in the area of the junkyard where the junkyard was clearly visible from the road at the time the permit applications were submitted. N.C.G.S. §§ 136-129(5), 136-144(1), 136-147.

Am Jur 2d, Advertising §§ 24, 25; Zoning and Planning § 323.

Judge GREENE dissenting.

Appeal by respondent from Judgment entered 30 June 1992 by Judge Donald W. Stephens in Wake County Superior Court. Heard in the Court of Appeals 7 July 1993.

Wilson & Waller, P.A., by Betty S. Waller and Brian E. Upchurch, for petitioner-appellee.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Elizabeth N. Strickland, for the State.

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LEWIS, Judge.

On 12 June 1991 Naegele Outdoor Advertising, Inc. (hereafter "Naegele") filed a petition seeking judicial review of a final decision of the North Carolina Department of Transportation (hereafter "DOT") denying its requests for outdoor advertising permits. The trial court granted Naegele's motion for summary judgment, denied DOT's motion for summary judgment, and ordered DOT to issue two permits to Naegele. DOT now appeals.

When DOT began construction on new N.C. Highway 16 in Gaston County in 1989, it exposed a previously hidden junkyard to view from the road. According to its duties set forth in the Junkyard Control Act, DOT attempted to remove or screen the site from view. In February 1990 District Engineer C.S. Ledbetter wrote to Mr. Tony Drum, owner of the junkyard, Sports Car Salvage, Ltd., advising him that the junkyard was nonconforming and would have to be removed or screened. In September 1990 DOT authorized the use of project funds for the screening, and in March and April 1991, DOT planted 50 Cypress trees in front of the junkyard to act as a natural screen.

On 20 October 1989, prior to the installment of any screening devices, Naegele applied for three outdoor advertising permits along Highway 16 in the area of the junkyard, claiming that the view of the junkyard rendered the unzoned area commercial for the purposes of outdoor advertising. Ledbetter returned Naegele's deposit on 25 October 1989 because the highway construction was not completed. On 20 July 1990 Naegele again applied for two permits in the same area, and Ledbetter again returned Naegele's checks, explaining that DOT was in the process of obtaining federal funds to screen the junkyard. Naegele submitted its third application for permits on 18 January 1991. On 8 February 1991 Ledbetter denied these applications for failure to comply with the North Carolina Administrative Code and the Outdoor Advertising Control Act, stating that the commercial activities were not visible from the roadway and that the business was scheduled to be screened.

Naegele appealed the denial of its third request on 8 March 1991 to the Secretary of DOT, Thomas J. Harrelson. On 2 May 1991, Harrelson upheld the denial of the permits because the commercial activity was not normally visible from the roadway, but was only temporarily visible due to a construction project and had been screened. Naegele filed its petition for judicial review of

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Harrelson's decision on 12 June 1991. As stated above, the trial court ruled in favor of Naegele, and DOT now appeals to this Court.

The issue before us is whether the temporary exposure of a junkyard to view by highway construction work is sufficient to render an unzoned area commercial for the purposes of outdoor advertising laws, even though the junkyard must eventually be screened from view or removed. Analysis of this issue involves examination of the inter-relationship, if any, between the Outdoor Advertising Control Act, N.C.G.S. §§ 136-126 to -140 (hereafter "OACA"), and the Junkyard Control Act, N.C.G.S. §§ 136-141 to -155 (hereafter "JCA").

According to section 136-129 of the OACA, outdoor advertising is not permitted "within 660 feet of the nearest edge of the right-of-way of the interstate or primary highways in this State so as to be visible from the main-traveled way thereof . . .," except in designated situations, which include "[o]utdoor advertising, . . ., located in unzoned commercial or industrial areas." § 136-129(5) (Cum. Supp. 1992). Unzoned commercial or industrial areas are defined by the rules and regulations as "[t]hose areas which are not zoned . . . and which are within 660 feet of the nearest edge of the right-of-way . . . in which there are located one or more permanent structures devoted to a commercial or industrial activity or on which a commercial or industrial activity is actually conducted . . ." N.C. Admin. Code tit. 19A, r. 2E.0201(c)(1) (Nov. 1990). However, an activity is not commercial or industrial if it is "not visible from the main traveled way." N.C. Admin. Code tit. 19A, r. 2E.0201(a)(9)(D) (Nov. 1990).

The JCA states that

[n]o junkyard shall be established, operated or maintained, any portion of which is within 1,000 feet of the nearest edge of the right-of-way of any interstate or primary highway, except . . . [t]hose which are screened by natural objects . . . so as not to be visible from the main-traveled way of the highway at any season of the year or otherwise removed from sight or screened in accordance with the rules and regulations promulgated by the Department of Transportation.

N.C.G.S. § 136-144(1) (1986). A junkyard lawfully in existence along any highway "which may be hereafter designated as an interstate

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or primary highway and which does not conform to the requirements for exception under G.S. 136-144 hereof, shall be screened, if feasible, by the Department of Transportation . . .” N.C.G.S. § 136-147 (1986).

According to DOT, because the junkyard “was only fortuitously and temporarily opened up by [DOT’s] construction project,” and because DOT had a duty under section 136-147 to screen the junkyard, that site could not qualify as a commercial activity under the OACA. DOT claims it is “clearly the intent of the JCA and the OACA to keep outdoor advertisers from claiming such junkyards as activities for qualifying unzoned areas as commercial or industrial when [DOT] is in the process of screening such junkyards.”

Naegele defends the trial court’s ruling, arguing that the two statutory schemes are unrelated. Naegele stresses that its permit applications must be viewed at the time they were submitted, when the junkyard was clearly visible from the road. The fact that the site would eventually be screened, if feasible, is irrelevant. The outdoor advertising statutes do not stipulate whether or not the commercial activity must be permanent or visible for a certain amount of time. The view of the junkyard and the fact that it is a commercial activity conducted within 660 feet of the highway satisfies the statutory requirements. Thus, according to Naegele, the permits should have been issued by DOT, and the trial court acted correctly in ordering DOT to issue them.

Finding no support for DOT’s argument, we agree with Naegele. The OACA and the JCA do not reference each other, nor do they in any way indicate that they are somehow related. *But see* N.C. Admin. Code tit. 19A, r. 2E.0201(a)(2)(J) (March 1993) (recent amendment, not applicable to the case at hand, excludes illegal and non-conforming junkyards, as defined by N.C.G.S. §§ 136-146 and -147, from the definition of commercial and industrial activities for the purposes of the outdoor advertising laws). We find DOT’s duty to screen or remove the junkyard did not change the fact that the exposure and location of the site qualified the area as an unzoned commercial area under the OACA.

DOT also argues that the issue is now moot, because zoning ordinances adopted in January 1992 prohibit outdoor advertising in the area in question. This argument is meritless. As Naegele points out, its application for the permits must be viewed under the facts and laws as they existed at the time of the application,

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in January 1991. There were no relevant zoning ordinances in effect at that time.

DOT finally contends that the commercial activity did not qualify the area as an unzoned commercial area under the regulations because its permanent building was more than 660 feet from the road. However, as stated above, the applicable regulation states that an "unzoned commercial area" includes areas "within 660 feet of the nearest edge of the right of way . . . in which there are located one or more permanent structures devoted to a commercial or industrial activity or on which a commercial or industrial activity is actually conducted" N.C. Admin. Code tit. 19A, r. 2E.0201(c)(1) (Nov. 1990). Although the junkyard's permanent building is more than 660 feet from the road, there is commercial activity conducted within 660 feet of the road, thereby satisfying one of the definitions of an unzoned commercial area.

According to the regulations, an outdoor advertising "permit along with a permit emblem shall be issued upon proper application, approval and the payment of fees for lawful outdoor advertising structures." N.C. Admin. Code tit. 19A, r. 2E.0208(a) (Nov. 1990). It appears that Naegele satisfied all the requirements for the issuance of the requested permits. We hereby affirm the trial court's grant of summary judgment for Naegele and denial of the same as to DOT.

Affirmed.

Judge EAGLES concurs.

Judge GREENE dissents.

Judge GREENE dissenting.

I disagree with the majority's conclusion that Naegele's application must be viewed at the time it was made, without regard to the fact that the Department of Transportation had a statutory obligation to screen the junkyard.

The Department of Transportation's construction project exposed the junkyard to view from the highway. The junkyard, however, will remain visible only until such time as the Department of Transportation screens it from the view of the highway, as

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the Department is required to do when a lawfully existing junkyard becomes exposed to view from an interstate or primary highway. N.C.G.S. § 136-147. The fact that the junkyard was temporarily visible while the construction project was in progress is not sufficient to render the previously unzoned area commercial for purposes of the Outdoor Advertising Control Act (the OACA). *Cf.* 19A NCAC 2E .0201(a)(3) (Feb. 1989) (recodified as 19A NCAC 2E .0201(a)(2)(c) (March 1993)) (temporary activities shall not be considered commercial or industrial for purposes of controlling outdoor advertising). Accordingly, the Department of Transportation was correct in denying Naegele's application for outdoor advertising permits which were filed while the construction was in progress. I would therefore reverse the trial court and remand for entry of summary judgment for the Department of Transportation.

HERMAN W. GIBBS, EMPLOYEE v. LEGGETT AND PLATT, INC., EMPLOYER,
AND TRANSPORTATION INSURANCE COMPANY, CARRIER

No. 9210IC850

(Filed 21 September 1993)

Master and Servant § 68 (NCI3d)— workers' compensation—torn rotator cuff—occupational disease—causes characteristic of and peculiar to his employment—sufficiency of evidence

The Industrial Commission's conclusion that plaintiff's spontaneous tear of the rotator cuff resulted from causes or conditions which were "characteristic of and peculiar to" his employment was supported by proper findings based upon competent evidence, and the Commission properly determined that plaintiff suffered from an occupational disease, where plaintiff was a janitor who operated a 500-pound, self-propelled power sweeper every other day for approximately seven hours; plaintiff and other employees noticed that the machine started pulling slightly to the right; plaintiff gradually started having pains in his right arm and shoulder and then experienced swelling and discoloration; plaintiff was diagnosed as having a spontaneous tear of the rotator cuff resulting from repeated stress or low impact trauma; an orthopaedist who performed arthroscopic surgery on plaintiff testified that his injury was consistent with the type of work plaintiff performed and that

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plaintiff's work placed him at a higher risk than the general public for injuries to the shoulder or arms; and defendant conceded that there was competent evidence to support a finding that the disease was due to causes and conditions "characteristic of plaintiff's employment" and that the disease was not an ordinary disease of life to which the general public is equally exposed outside the employment. N.C.G.S. § 97-57(13).

Am Jur 2d, Master and Servant §§ 123, 124, 187 et seq.

Appeal by defendant from Opinion and Award of the North Carolina Industrial Commission filed 21 May 1992. Heard in the Court of Appeals 17 June 1993.

Snow & Skager, by James M. Snow, for plaintiff-appellee.

Young, Moore, Henderson & Alvis, P.A., by Richard J. Archie and J. D. Prather, for defendant-appellant.

WYNN, Judge.

Plaintiff, Herman W. Gibbs, worked as a janitor for defendant, Leggett & Platt, Inc. Over the course of ten months, he developed swelling and discoloration in his right shoulder which was diagnosed as the result of a "spontaneous" tear of the rotator cuff. Plaintiff filed a claim seeking recovery for an occupational disease pursuant to N.C.G.S. § 97-53(13), arguing that his injury occurred as a result of his operation of a power sweeper. Both parties presented evidence and Deputy Commissioner Lawrence B. Shuping filed an Opinion and Award which contained the following pertinent findings of fact:

1. Plaintiff's claim is for a disabling torn rotator cuff in the right shoulder due to repetitive stress to his right arm and shoulder from operating a power sweeper in the course of his janitor's job for defendant-employer, which (disease or condition) is characteristic of and peculiar to employment in the same trade, occupation or employment wherein, as compared to members of the general public and other employments at large, where there is an increased risk of developing the same condition because it requires manual labor involving use, and ultimately overuse of the arm and shoulder.

. . .

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2. Plaintiff is a 61-year old married male with a fourth grade education.

Although plaintiff has reached maximum medical improvement from the involved shoulder condition giving rise hereto, been rated for his resulting permanent-partial disability and released to return to work by his treating physician, Dr. Wheeler [sic]; plaintiff has not attempted to return to work. . . ; however, at this point there is no medical evidence in the record as to the limitations of the permanent shoulder injury involved so that a determination might be made as to the extent of any whole or partial incapacity to work as a result of the involved shoulder injury—much less the resulting extent of plaintiff's permanent-partial disability.

. . .

4. . . . The involved Model 186 LPG Tennant Sweeper was a self-propelled, three wheeled motorized power sweeper, which weighed some 500 pounds, was controlled by hand clutch, equipped with a brush on it's right side and had a natural tendency to drift and/or pull to the right requiring plaintiff, who is admittedly a small man, to use both hands in operating the same machine at least several hours every other day at work.

5. Due to the repetitive stress to his right arm and shoulder from operating the above-described Tennant power sweeper in the course of his employment as a janitor for defendant-employer, plaintiff not only sustained a spontaneous tear of his right rotator cuff on 4 January 1990 but months earlier had become [sic] developing impingement syndrome in the same shoulder resulting in progressively worsening shoulder pain and a slow, but steady tear of the rotator cuff until it's ultimate spontaneous rupture on the first mentioned date.

. . .

8. Plaintiff ultimately reached maximum medical improvement and/or the end of the healing period from and following his torn right rotator cuff on or about August 17, 1990 when he was last seen by Dr. Wheeler [sic] and does retain some degree of permanent-partial disability as a result of his torn right rotator cuff.

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Based upon these and other findings, the deputy commissioner concluded as a matter of law that:

1. Due to the hereinabove-described repetitive stress to his right arm and shoulder from operating the Model 186 LPJ [sic] Tennant sweeper in the course of his regular janitor's job for defendant-employer, plaintiff has developed a disabling torn right rotator cuff, which (disease or condition) is thus due to causes and conditions which are characteristic of and peculiar to his particular trade, occupation or employment because it requires manual labor involving use, and ultimately overuse, of the arm and shoulder, but excluding all ordinary diseases of life to which the general public is equally exposed outside of that employment. Plaintiff has thus contracted a compensable occupational disease pursuant to the provisions of G.S. § 97-53(14) [sic].

2. As a result of the occupational disease giving rise hereto plaintiff was temporarily totally disabled from January 5, 1990 to June 25, 1990 when he was released to return to work by Dr. Wheeler [sic] entitling him to compensation at a rate of \$165.33 per week during the same period; however, pending evidence as to the extent of plaintiff's permanent-partial disability and any resulting physical limitations therefrom a determination cannot be made as to whether plaintiff remains wholly or partially disabled since June 25, 1990.

3. Plaintiff ultimately reached maximum medical improvement and/or the end of the healing period from and following the occupational disease giving rise hereto on or about August 17, 1988 and does retain some degree of permanent-partial disability; however, a determination as to the extent thereof cannot be determined in the absence of further medical evidence.

Based upon the findings and conclusions, the deputy commissioner awarded benefits. Defendants appealed to the Commission and the Full Commission affirmed and adopted the opinion and award of the deputy commissioner. Defendants thereafter appealed to this court. We affirm.

I.

Defendants-appellants argue that the Full Commission's conclusion that plaintiff's condition or disease resulted from causes and

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conditions which are "characteristic of and peculiar to" his employment is not supported by proper findings based upon competent evidence and, therefore plaintiff is not entitled to compensation for an occupational disease pursuant to N.C.G.S. § 97-53(13).

The findings of fact of the Industrial Commission are conclusive on appeal when supported by competent evidence even though there is evidence to support contrary findings. *Morrison v. Burlington Industries*, 304 N.C. 1, 282 S.E.2d 458 (1981). As a result, our review is limited to two specific questions: 1) Whether the findings of fact are supported by any competent evidence, and 2) Whether those findings of fact in turn justify the legal conclusions and decision. *Hansel v. Sherman Textiles*, 304 N.C. 44, 283 S.E.2d 101 (1981).

For a disability to be compensable under the Workers' Compensation Act, it must be either the result of an accident arising out of and in the course of employment or an "occupational disease." *Id.*; *Booker v. Duke Medical Center*, 297 N.C. 458, 564, 256 S.E.2d 189, 194 (1979). An occupational disease is defined as:

Any disease . . . which is proven to be due to causes and conditions which are characteristic of and peculiar to a particular trade, occupation or employment, but excluding all ordinary diseases of life to which the general public is equally exposed outside of the employment.

N.C.G.S. § 97-53(13) (1991). The North Carolina Supreme Court has outlined three elements necessary to prove the existence of an "occupational disease" under N.C.G.S. § 97-53(13). The disease must be:

(1) characteristic of persons engaged in the particular trade or occupation in which the claimant is engaged; (2) not an ordinary disease of life to which the public generally is equally exposed with those engaged in that particular trade or occupation; and (3) there must be "a causal connection between the disease and the [claimant's] employment."

Rutledge v. Tultex Corp./Kings Yarn, 308 N.C. 85, 93, 301 S.E.2d 359, 365 (1983) (citing and quoting *Hansel v. Sherman Textiles*, 304 N.C. at 52, 283 S.E.2d at 105-06 (1981); and *Booker*, 297 N.C. at 468, 475, 256 S.E.2d at 196, 200). Plaintiff bears the burden of proving every element of compensability. *Hansel*, 304 N.C. at 54, 283 S.E.2d at 106.

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Defendants concede that there is competent evidence to support a finding that 1) the disease is “‘characteristic of’ the employment such that there is a ‘recognizable link between the nature of the job and an increased risk of contracting the disease in question’” and 2) that the disease is not an “ordinary disease of life ‘to which the general public is equally exposed outside of the employment.’” Defendants contend however, that there was insufficient evidence in this case to support the Commission’s finding of fact that plaintiff’s torn rotator cuff is “peculiar to” his employment as a janitor.

To qualify as “peculiar to” the employment, defendants argue, citing *Booker*, that the “conditions of that employment must result in a hazard which distinguishes it in character from the general run of occupations.” In *Booker*, Chief Justice Sharp writing for our Supreme Court conducted a thorough examination of other jurisdictions with similar occupational disease statutes and set forth the test for determining whether a disease is “characteristic of and peculiar to” a trade or profession. We need not repeat that full examination, however, the Court therein noted that a particular illness need not be “unique” to an injured employee’s profession to be compensable. Rather, the Court held that in the final analysis, where the evidence supported a determination that the injured employee’s “job exposed him to a higher risk of contracting the disease than members of the public or employee in general,” this was sufficient to support the conclusion that the employee’s disease is characteristic of and peculiar to his occupation. The greater risk in such cases provides the nexus between the disease and the employment which makes them an appropriate subject for workman’s compensation. *Booker*, 297 N.C. at 475, 256 S.E.2d at 200. Thus, only those ordinary diseases of life to which the general public is exposed equally with workers in the particular trade or occupation are excluded. *Id.*; *Rutledge*, 308 N.C. at 93, 301 S.E.2d at 365.

Our Courts have consistently followed the guidelines established in *Booker*. See *Thomason v. Fiber Industries*, 78 N.C. App. 159, 336 S.E.2d 632 (1985), *disc. rev. denied*, 316 N.C. 202, 341 S.E.2d 573 (1986) (Occupational disease found where repeated lifting, straining and pulling placed plaintiff at a greater risk of contracting inflammatory disease than the public at large.); *Perry v. Burlington Industries*, 80 N.C. App. 650, 655, 343 S.E.2d 215, 219 (1986) (Occupational disease is compensable if employment exposed

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claimant "to a greater risk of contracting [the] disease than members of the public generally. . ."); *Keel v. H & V Inc.*, 107 N.C. App. 536, 421 S.E.2d 362 (1992); *Rutledge*, 308 N.C. at 93-94, 301 S.E.2d at 365; *Lumley v. Dancy Const. Co.*, 79 N.C. App. 114, 339 S.E.2d 9 (1986).

The following evidence was offered to support the Commission's finding that the spontaneous tear of the rotator cuff is an occupational disease within the meaning of N.C.G.S. § 97-57(13). In March of 1989, Leggett and Platt purchased a five hundred pound, three wheel, Tennant Power Sweeper. The sweeper is self-propelled and operated by depressing a hand clutch. Plaintiff testified that he operated the sweeper every other day for approximately seven hours. Plaintiff and other employees noticed that the machine started pulling slightly to the right. Plaintiff gradually started having pains in his right arm and shoulder. By January of 1990, he experienced swelling and discoloration.

Dr. Edward Weller, an orthopaedist, diagnosed plaintiff as having a "spontaneous" tear of the rotator cuff resulting from repeated stress or low impact trauma. The diagnosis was confirmed on 14 February 1990 by arthroscopy and surgery. Dr. Weller testified that plaintiff's injury was consistent with the type of work plaintiff performed and that plaintiff's work placed him at a higher risk than the general public for injuries to the shoulder or arms. This evidence is sufficient to meet the test set forth in *Booker* for determining whether a disease meets the "peculiar to" requirement set forth in the statute. Furthermore, defendant concedes that there is competent evidence to support a finding that the disease is due to causes and conditions "characteristic of plaintiff's employment" and that the disease is not an ordinary disease of life to which the general public is equally exposed outside the employment.

For the foregoing reasons, we find the Commission properly determined that plaintiff suffered from an occupational disease within the meaning of N.C.G.S. § 97-53(13) and the opinion and award of the Full Commission is

Affirmed.

Judges JOHNSON and JOHN concur.

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[112 N.C. App. 110 (1993)]

JOAN BELL LEMON, PLAINTIFF v. JACKSON B. LEMON, JR., DEFENDANT

No. 9210DC328

(Filed 21 September 1993)

Divorce and Separation § 290 (NCI4th) — modifiability of alimony provisions—consent judgment provisions not integrated—sufficiency of evidence

Evidence was sufficient to support the trial court's findings and conclusions that the previous order and consent judgment entered into by the parties was not integrated and was modifiable where the testimony of the parties and their attorneys at the time indicated that the parties would own their house as tenants in common and plaintiff would continue to live in it, but there was no indication that settlement on the marital property related to the support payments to be paid to plaintiff.

Am Jur 2d, Divorce and Separation §§ 583, 699 et seq.

Appeal by defendant from order entered 20 December 1991 by Judge Russell G. Sherrill in Wake County District Court. Heard in the Court of Appeals 9 March 1992.

The plaintiff-appellee instituted this action as a motion in the cause on 7 December 1989, pursuant to N.C. Gen. Stat. § 50-16.9, seeking an increase in alimony on the grounds of changed circumstances. The defendant-appellee resisted the motion, arguing that the previous order and consent judgment in the cause executed on 7 December 1978 was integrated and non-modifiable. Upon a hearing in Wake County District Court on 3 January 1990, the trial court concluded that the consent order and judgment was indeed modifiable. Without hearing evidence from the defendant, the court entered an order finding, *inter alia*, that the consent order and judgment was modifiable, that the circumstances of the plaintiff had changed since the entry of the order in 1978, and ordered an increase in alimony to be paid by the defendant.

From that order, defendant appealed, arguing that he should have been allowed to present evidence regarding the intent of the parties concerning "whether or not the provisions of the agreement were separable or integrated." This Court agreed and remanded the case to the trial court for an evidentiary hearing consistent with

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its opinion. *Lemons v. Lemons*, 103 N.C. App. 492, 406 S.E.2d 8 (1991) (hereinafter *Lemons I*).

That hearing, from which this appeal arises, was held in Wake County District Court on 29 and 30 October 1991. Both parties and their respective counsel at the time of the original agreement testified. At the close of the evidence, the trial court found that the defendant had failed to prove by a preponderance of the evidence that the provisions for alimony contained in the agreement were integrated with the other provisions of the agreement. The court concluded once again that the agreement was modifiable and accordingly entered an order increasing alimony payments to plaintiff. Defendant appeals that decision.

John Everette Noland, Jr. for plaintiff-appellee.

Luke D. Hyde for defendant-appellant.

ORR, Judge.

Defendant argues three issues on appeal. First, he contends that the trial court erred in concluding that the order and consent judgment executed between the parties on 7 December 1978 was modifiable; second, that the trial court erred in determining that the defendant had failed to meet his burden of proof in showing that the above document was integrated and therefore non-modifiable; and third, that the trial court's findings of fact and conclusions of law are not supported by the evidence presented. We disagree with these contentions and accordingly affirm the decision of the trial court.

I.

Court-ordered support payments which are part of an integrated agreement are not subject to modification by the trial court nor do they terminate as a matter of law upon remarriage of the dependant spouse. *Marks v. Marks*, 316 N.C. 447, 342 S.E.2d 859 (1986). "If support provisions are found to be in consideration for, and inseparable from, property settlement provisions, the support provisions, even if contained in a court-ordered consent judgment, *are not alimony* but instead are merely part of an integrated property settlement which is *not* modifiable by the courts." *Id.* at 455, 342 S.E.2d at 864 (emphasis in original).

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As this Court explained in *Lemons I*:

To resolve the question of whether an agreement is integrated or non-integrated, we look to the intention of the parties. If the agreement contains an unequivocal clause regarding integration or if it contains unequivocal integration language, then this clause or language controls. In the absence of an integration clause and of integration language, the trial court must hold an evidentiary hearing to determine the parties' intent. (Emphasis added.) At the hearing, there is a presumption that the provisions of the agreement are separable. The effect of this presumption is to place the burden of proof . . . on the party claiming that the agreement is integrated. In order to prevail, the party claiming the agreement is integrated must rebut the presumption by proving by a preponderance of the evidence that the parties intended an integrated agreement.

Lemons, 103 N.C. App. at 495, 406 S.E.2d at 10 (citations omitted).

Thus, at the evidentiary hearing mandated by this Court in *Lemons I*, the burden was on the defendant to show that the property settlement clause, which allowed the plaintiff to continue to live in the marital home and which agreed to "convert the formal ownership to tenants in common with rights of survivorship", was given in consideration for the support payments. "If the support and property provisions exist reciprocally, the order is considered to reflect an integrated agreement, and the support payments are not alimony in the true sense of the word. . . ." *Hayes v. Hayes*, 100 N.C. App. 138, 146, 394 S.E.2d 675, 679 (1990).

Mr. Lemons' testimony included the following:

Q. Part of the dispute in this case has to do with paragraph 7, about who is going to own the property. On page 6, 3011 Mayview Road, would you please read the first sentence of that paragraph to the Court.

A. The plaintiff shall be entitled to occupy and use the family residence located at 3011 Mayview Road, Raleigh, without payment of rent to the defendant as long as she remains unmarried.

Q. Does that have any provision in there that she will be able to occupy this property as long as she shall live?

A. No.

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Q. Is there any provision anywhere in here that this property shall be her property without any control from you? Did you discuss that with your attorney?

A. It seems somewhere the property is supposed to be mutually owned.

Q. Do you remember in 1978, prior to signing this order in the court discussing with your attorney whether this property was going to be owned by her or owned by you or owned by both of you mutually or any conditions of its ownership?

A. I think it would be mutually owned; half of it was hers and half of it was mine.

Q. And that was the way you understand it?

A. Yes.

Q. Was that your understanding of how the property was owned when you separated from her; both of you-alls names was on the property?

A. Yes. Both of our names were on the property. Period.

The defendant did not indicate that he expected that the settlement on the marital property related to the support payments to be paid to the plaintiff. His original attorney testified that the intent was to "settle all things, the property included." The Court asked, in response to this statement, if it were not true that only the death of one or the other would settle the ownership of the property. The witness agreed that because the parties intended to create a tenancy in common with right of survivorship, that was the case. Mrs. Lemons testified that she did not intend to enter into an agreement which was not modifiable. Her attorney at the time of the drafting of the agreement also testified that they did not intend to create a non-modifiable agreement.

While the defendant did present some evidence of negotiation of the property issue at about the same time that other issues, such as custody, child support, and alimony were being discussed, the trial court found that this showing was insufficient to overcome the presumption that the agreement was separable. Consequently, the agreement could be modified by the court upon a showing of changed circumstances. *White v. White*, 296 N.C. 661, 252 S.E.2d 698 (1979).

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II.

We further find that there is no merit in defendant's final argument that there was insufficient evidence to support the trial court's findings of fact and conclusions of law. Upon appellate review of a case heard without a jury, the trial court's findings of fact are conclusive on appeal if there is evidence to support them, even though the evidence might sustain a finding to the contrary. *Chandler v. Chandler*, 108 N.C. App. 66, 422 S.E.2d 587 (1992).

In his findings of fact, the trial court stated:

22. On July 16, 1990, a decision of the Court of Appeals was filed in which this matter was remanded to this court for a hearing on the intention of the parties in agreeing to the Order and Consent Judgment of December 7, 1978.

. . .

24. At the hearing,. . . Mr. Lemons testified that he did not discuss with his attorney, Mr. Hatch, whether the child support provisions in the Order could be changed, or whether the alimony provisions could be changed. Mr. Lemons testified that it was his belief that the provisions with respect to alimony could not be changed, but he did not remember discussing this question with his attorney or with counsel for his wife.

25. The Order and Consent Judgment signed on December 7, 1978 contains a provision which provides that the parties would convert the formal ownership of the real property owned by them to tenants in common with rights of survivorship. At the hearing . . . Mr. Lemons did not testify that this provision was inserted in the order in exchange for his undertaking to pay alimony. The testimony of Mr. Lemons was that it was his understanding that, the way his order was written, if Mrs. Lemons was ever to remarry, that they would sell the house and divide the property.

. . .

29. With respect to the wording in the Order and Consent Judgment, the court finds that the statement, "All matters and things between the parties have been compromised and settled" refers to the matters at issue, which were alimony, child custody and support. The undersigned finds that matters

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relating to the real and personal property of the parties were not in issue in the action.

. . .

32. The court finds that from the evidence that the provisions in the Order and Consent Judgment of December 7, 1978, relating to the form of ownership and the possession of the family home on Mayview Road were negotiated separately from the question of alimony.

. . .

34. The court has carefully reviewed the language of the order of December 7, 1978, in view of the testimony of the parties, and finds that the Order, as it contains findings of fact and conclusions of law, is more likely a true alimony order than a separation agreement, and further finds that the language of the Order wherein it is stated that the parties have stipulated and agreed "that the plaintiff is entitled to permanent alimony", is an indication that true alimony, as opposed to support payments given as reciprocal consideration for the exchange of property, was intended.

Modification of an alimony award is in the discretion of the trial judge and will not be disturbed absent an abuse of discretion. *Hill v. Hill*, 105 N.C. App. 334, 413 S.E.2d 570 (1992). We find no abuse of discretion here. There was competent evidence in the record to support a conclusion by the trial judge that the 1978 agreement was modifiable and the agreement was not integrated. There is no question that substantial changes in circumstances were presented by the plaintiff. We therefore affirm the decision of the trial court in all respects.

Affirmed.

Judges WELLS and MARTIN concur.

BUTZ v. HOLDER

[112 N.C. App. 116 (1993)]

EARL R. BUTZ, LINDA M. BUTZ, AND MARC BUTZ, PLAINTIFFS v. JIMMY
DAVIS HOLDER, DEFENDANT

No. 9211SC252

(Filed 21 September 1993)

**Negligence § 19 (NC14th)— negligent infliction of emotional
distress—parents arriving at accident scene—foreseeability—
sufficiency of evidence**

In an action to recover for negligent infliction of emotional distress, the trial court properly granted summary judgment for defendant on plaintiff brother's claim but erred in granting it on plaintiff parents' claim, since defendant could have reasonably foreseen that his negligence might be a direct or proximate cause of plaintiff parents' emotional distress where the thirteen-year-old decedent was struck and killed by an automobile driven by defendant; the father and mother of decedent arrived at the scene of the accident shortly after its occurrence; there was evidence that the mother sought psychiatric and psychological care for emotional distress after the accident; the father developed high blood pressure and also sought psychological treatment; but there was no evidence that the brother suffered any emotional or mental disorder.

**Am Jur 2d, Fright, Shock and Emotional Anguish §§ 1,
3, 15, 24, 47, 48, 55; Negligence §§ 488-491.**

Appeal by plaintiffs from order entered 16 December 1991 by Judge Giles R. Clark in Harnett County Superior Court. Heard in the Court of Appeals 5 January 1993.

*Smith, Debnam, Hibbert & Pahl, by John W. Narron and
Elizabeth B. Godfrey, for plaintiffs-appellants.*

Savage & Godfrey, by David R. Godfrey, for plaintiffs-appellants.

*Bailey & Dixon, by Gary S. Parsons and Denise Stanford
Haskell, for defendant-appellee.*

JOHNSON, Judge.

The facts pertinent to this appeal are as follows: decedent, thirteen year old Dwayne John Butz, son and brother of plaintiffs herein, was riding his bicycle on Rural Road 1415 when he was

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struck by an automobile driven by defendant. The site of the accident was approximately five or six tenths of a mile from plaintiffs' home by road. Decedent was killed instantly. There were no witnesses to the accident, which occurred on a bridge.

Shortly thereafter, plaintiff Earl R. Butz, decedent's father, who was at his house painting his garage, was told by a neighbor that there had been a serious accident. Earl R. Butz drove to the scene of the accident and saw decedent, covered with a sleeping bag, in the road. Plaintiff Linda M. Butz, decedent's mother, arrived at the scene 15 or 20 minutes later; decedent's brother, plaintiff Marc Butz, arrived shortly after his mother.

Plaintiff Linda M. Butz has sought psychiatric and psychological care for emotional distress suffered as a result of the accident; Earl R. Butz has developed high blood pressure, has been put on medication by his physician, and has also sought psychological treatment as a result of his emotional distress.

Plaintiffs filed an action in Harnett County Superior Court on 22 July 1991, seeking damages for negligent infliction of emotional distress caused by this accident, which occurred on 27 August 1988. The superior court granted defendant's motion for summary judgment, and plaintiffs appealed to this Court. The issue raised on this appeal is whether the trial court erred by granting this motion for summary judgment, because genuine issues of material fact exist as to whether plaintiffs' severe emotional distress was a reasonably foreseeable result of the negligent conduct of defendant.

Summary judgment is appropriate only when there is no genuine issue of material fact and a party is entitled to judgment as a matter of law. North Carolina General Statutes § 1A-1, Rule 56 (1990). The moving party has the burden of establishing the lack of any triable issue, and may meet this burden by proving that an essential element of the opposing party's claim is non-existent. All inferences of fact from the proof offered at the hearing must be looked at in the light most favorable to the nonmoving party. *Mozingo v. Pitt County Memorial Hospital*, 331 N.C. 182, 415 S.E.2d 341 (1992).

The elements to establish a claim for negligent infliction of emotional distress are set out in *Johnson v. Ruark Obstetrics*, 327 N.C. 283, 395 S.E.2d 85, *reh'g denied*, 327 N.C. 644, 399 S.E.2d 133 (1990). In order to state a claim for negligent infliction of emo-

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tional distress, "a plaintiff must allege that (1) the defendant negligently engaged in conduct, (2) it was reasonably foreseeable that such conduct would cause the plaintiff severe emotional distress (often referred to as 'mental anguish'), and (3) the conduct did in fact cause the plaintiff severe emotional distress." *Id.* at 304, 395 S.E.2d at 97.

Neither a physical injury or impact nor a subsequent manifestation of a physical sort is required as an element of the tort of negligent infliction of emotional distress. *Id.* And, "a plaintiff may recover for his or her severe emotional distress arising due to concern for another person, *if* the plaintiff can prove that he or she has suffered such severe emotional distress as a proximate and *foreseeable* result of the defendant's negligence." *Id.*

Factors which the trial judge should consider in determining this foreseeability include the plaintiff's proximity to the negligent act, the relationship between the plaintiff and the decedent, and whether the plaintiff actually observed the negligent act. *Sorrells v. M.Y.B. Hospitality Ventures of Asheville*, 108 N.C. App. 668, 424 S.E.2d 676 (1993). The determination of foreseeability and proximate cause must be determined on a case-by-case basis. *Ruark*, 327 N.C. at 305, 395 S.E.2d at 98; *Gardner v. Gardner*, 106 N.C. App. 635, 418 S.E.2d 260 (1992).

In *Gardner*, plaintiff mother appealed a summary judgment motion on her claim of relief for negligent infliction of emotional distress arising from an accident in which her minor son was killed. The decedent lived with plaintiff; when the accident occurred he was riding in a car with his father, the defendant. The plaintiff heard about the accident and went immediately to the hospital emergency room. Her young son was on a stretcher, his body covered except for his hands and feet. Plaintiff remained at the hospital, and did not see her son again until he died later in the day.

Our Court held in *Gardner* that the defendant "could have reasonably foreseen that his negligence might be a direct and proximate cause of the plaintiff's emotional distress." *Gardner* at 639, 418 S.E.2d at 263. The Court reasoned that "[i]n common experience, a parent who sees its mortally injured child soon after an accident, albeit at another place, perceives the danger to the child's life, and experiences those agonizing hours preceding the awful message of death may be at no less risk of suffering a similar degree of emotional distress than that of a parent who is actually exposed

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to the scene of the accident." *See also Hickman v. McKoin*, 109 N.C. App. 478, 428 S.E.2d 251 (1993), where our Court held plaintiff children had a cause of action in their attempt to recover for negligent infliction of emotional distress arising from injuries to their mother arising out of an automobile accident.

Sorrells, 108 N.C. App. 668, 424 S.E.2d 676, dealt with the question of foreseeability of emotional distress suffered by the parents of a twenty-one year old son, after learning that their son had been killed in a serious automobile accident and his body mutilated. Plaintiffs in *Sorrells* brought a cause of action against a defendant who negligently served alcohol to their son, which was a proximate cause of the son's death. Our Court held that this question of foreseeability was a question for the jury. *Sorrells* at 672, 424 S.E.2d at 679-80.

In *Andersen v. Baccus*, 109 N.C. App. 16, 426 S.E.2d 105, *disc. review allowed*, 333 N.C. 574, 429 S.E.2d 567 (1993), plaintiff brought an action for negligent infliction of emotional distress against defendant who was driving an automobile which was involved in an accident in which plaintiff's wife and son were killed. As our Court pointed out:

Plaintiff's urging that this Court find the family relationship between the plaintiff and the decedent sufficient to send the question of foreseeability in the present case to the jury, effectively asks us to recognize a cause of action based on negligent infliction of emotional distress in every instance where a family member learns, after the fact, of the injury or death of a relative resulting from a negligently caused accident. Nonetheless, while we do not believe that our Supreme Court's holding in *Ruark* was intended to have such an unlimited and all-encompassing effect, we must follow the precedent as currently set forth by this Court and find that it was error for the trial court to grant summary judgment on this issue. *See In re Civil Penalty*, 324 N.C. 373, 379 S.E.2d 30 (1989) ('Where a panel of the Court of Appeals has decided the same issue albeit in a different case, a subsequent panel is bound by that precedent.')

Id. at 25, 426 S.E.2d at 110. We note that our Supreme Court has granted certiorari to review *Andersen*.

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[112 N.C. App. 120 (1993)]

Likewise, on the facts of the case *sub judice*, where plaintiffs father and mother of the decedent arrived at the scene of the accident shortly after its occurrence, defendant could have reasonably foreseen that negligence on defendant's part might be a direct or proximate cause of plaintiff parents' emotional distress. We hold that this issue of foreseeability as to the parents for negligent infliction of emotional distress is one for the jury.

One of the elements necessary to establish a claim for negligent infliction of emotional distress is that the plaintiff suffer "severe emotional distress" as a result of the defendant's negligence. *Ruark*, 327 N.C. at 304, 395 S.E.2d at 97. We note that there is no evidence in the record that the brother, Marc Butz, suffered any emotional or mental disorder. As a result, the trial judge properly dismissed the brother's claim at the summary judgment hearing.

In summary, we reverse the trial court in granting summary judgment for defendant on the claims of plaintiffs Earl R. Butz and Linda M. Butz. We affirm the trial court in granting summary judgment for defendant on plaintiff Marc Butz's claim.

The decision of the trial court is reversed in part and affirmed in part.

Judge MARTIN concurs.

Judge GREENE concurs in the result.

ADAMS OUTDOOR ADVERTISING OF CHARLOTTE, A MINNESOTA LIMITED
PARTNERSHIP v. THE NORTH CAROLINA DEPARTMENT OF
TRANSPORTATION

No. 9210SC937

(Filed 21 September 1993)

**Eminent Domain §§ 34, 287 (NCI4th) — DOT's planting of trees —
obstruction of billboards — no taking of property**

The obstruction of view of plaintiff's billboards due to the vegetation and trees planted by DOT as part of a highway beautification project did not amount to a taking of plaintiff's property by inverse condemnation. N.C.G.S. § 136-111.

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[112 N.C. App. 120 (1993)]

Am Jur 2d, Eminent Domain §§ 501 et seq.**Eminent domain: compensability of loss of visibility of owner's property. 7 ALR5th 113.**

Appeal by plaintiff from order entered 11 June 1992 by Judge Donald W. Stephens in Wake County Superior Court. Heard in the Court of Appeals 8 July 1993.

On 8 January 1992, plaintiff instituted this action by filing a complaint alleging inverse condemnation of its property. On 11 March 1992, the North Carolina Department of Transportation (DOT) filed a motion to dismiss plaintiff's complaint for failure to state a claim. From Judge Stephens' 11 June 1992 order allowing defendant's motion to dismiss, plaintiff appeals.

Wilson & Waller, P.A., by Betty S. Waller and Brian E. Upchurch, for plaintiff-appellant.

Attorney General Lacy H. Thornburg, by Assistant Attorney General John F. Maddrey and Assistant Attorney General Elizabeth N. Strickland, for the State.

McCRODDEN, Judge.

In this appeal, we must determine whether defendant's planting of trees and vegetation within its right-of-way adjacent to premises on which plaintiff owns and leases outdoor advertising signs (billboards) constitutes a taking of plaintiff's property such that plaintiff is entitled to compensation. At issue are eleven billboards which are located on private property adjacent to the Airport Connector Road and the Billy Graham Parkway in Mecklenburg County. Plaintiff's contention is that the trial court erred in dismissing its complaint because, according to plaintiff, the complaint stated a cause of action for inverse condemnation under the Fifth and Fourteenth Amendments to the United States Constitution, Article I, Section 19 of the North Carolina Constitution, and N.C. Gen. Stat. § 136-111 (1986).

Plaintiff's complaint alleged, *inter alia*, that subsequent to the erection of plaintiff's billboards, DOT began a program of planting trees and vegetation within the state owned right-of-way adjacent to plaintiff's leased premises pursuant to a state-initiated and funded highway beautification project. Plaintiff further claimed that since the vegetation has obscured or will eventually obscure its bill-

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boards, the billboards have been rendered economically useless; therefore, plaintiff is entitled to compensation on the basis of inverse condemnation of its property rights, pursuant to N.C.G.S. § 136-111.

A motion to dismiss pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) (1990), challenges the sufficiency of the complaint to state a claim upon which relief can be granted. Dismissal under Rule 12(b)(6) is proper if no law exists to support the claim, if sufficient facts to make out a good claim are absent, or if there are known facts which necessarily defeat the claim. *Burgess v. Your House of Raleigh*, 326 N.C. 205, 209, 388 S.E.2d 134, 136 (1990).

Although plaintiff asserted in its complaint that it should be awarded compensation pursuant to N.C.G.S. § 136-111 because DOT's actions constituted a "taking" of its property, the complaint failed to raise constitutional questions, and the record on appeal contains no indication that plaintiff argued the constitutional issues at the trial level. An appellate court should not pass upon a constitutional question unless it affirmatively appears that the party urging the claim raised it at trial and the trial court ruled upon it. *Powe v. Odell*, 312 N.C. 410, 416, 322 S.E.2d 762, 765 (1984). Since plaintiff failed to ask the trial court to rule upon these constitutional issues, we decline to rule on them now.

We will, however, address whether plaintiff's complaint states a cause of action pursuant to N.C.G.S. § 136-111. That statute provides that "[a]ny person whose land or compensable interest therein has been taken by an intentional or unintentional act or omission of the Department of Transportation . . . [may] file a complaint in the superior court . . ." to obtain compensation for the taking. An action in inverse condemnation must show (1) a taking (2) of private property (3) for a public use or purpose. *Advertising Co. v. City of Charlotte*, 50 N.C. App. 150, 153-54, 272 S.E.2d 920, 922 (1980). Although an actual occupation of the land, dispossession of the landowner, or physical touching of the land is not necessary, a taking of private property requires "a substantial interference with elemental rights growing out of the ownership of the property." *Long v. City of Charlotte*, 306 N.C. 187, 198-99, 293 S.E.2d 101, 109 (1982). A plaintiff must show an actual interference with or disturbance of property rights resulting in injuries which are not merely consequential or incidental. *Id.* at 199, 293 S.E.2d at 109.

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While Black's Law Dictionary does not define the word *consequential*, it does define the term *consequential damages*, and from this definition, we may determine what the Supreme Court meant when it wrote of "injuries which are not merely consequential." *Consequential damages* means "[s]uch damage, loss or injury as does not flow directly and immediately from the act of the party, but only from some of the consequences or results of such act." Black's Law Dictionary 390 (6th ed. 1990). Black's Law Dictionary defines *incidental* as "[d]epending upon or appertaining to something else as primary; something necessary, appertaining to, or depending upon another which is termed the principal; something incidental to the main purpose." Black's Law Dictionary 762. Using these definitions, we conclude that plaintiff's complaint fails to state a claim of inverse condemnation.

Plaintiff's complaint states in pertinent part:

6. . . . DOT has planted certain trees and other vegetation on the highway right-of-way adjacent to the airport connector and the Billy Graham Parkway. . . . The trees were planted for a public use and purpose.

9. Because of the size and placement of these trees at or near plaintiff's billboards, the view and legibility of the billboards has been substantially and severely limited and obscured, and many billboards have been rendered economically useless.

11. Plaintiff's advertisers have begun cancelling their advertisements on the referenced signs due to the visual obstruction created by the referenced trees. Plaintiff's property, or compensable interest therein, thus has been taken by the intentional or unintentional act of the DOT . . . in such a manner to render the billboards economically useless

13. . . . Defendant has thus unilaterally, intentionally, and without due process of law disregarded and destroyed all economically viable use plaintiff has for its valuable billboards and related property interests, the destruction of which constitutes a taking for which plaintiff is entitled to just compensation.

Defendant's planting of trees as part of its beautification project was defendant's primary act, of which the obscuring of plaintiff's billboards was only a consequential or incidental result. Moreover, we note that defendant's use of its right-of-way to plant trees is consistent with its statutory powers. N.C. Gen. Stat.

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§ 136-18(9) (Supp. 1992) empowers DOT to “employ appropriate means for properly selecting, planting and protecting trees, shrubs, vines, grasses or legumes in the highway right-of-way in the promotion of . . . landscaping.” This statute was enacted prior to 1981, when plaintiff’s predecessors in interest first entered into agreements for the lease of the property at issue. Therefore, plaintiff was charged with notice at the time it erected the billboards that DOT might plant trees and shrubs in the right-of-way near its leased premises. Finally, although there is no case directly addressing the issue raised by this case, North Carolina case law supports by analogy the trial court’s ruling that the obstruction of the right to view does not constitute a taking of property. The Supreme Court, for example, held in *Wofford v. Highway Commission* that, when a public highway was closed so as to leave plaintiff’s property on a cul-de-sac, there was no compensable damage due to the diminution of value of the property resulting from the limitation of access. 263 N.C. 677, 140 S.E.2d 376, *cert. denied*, 382 U.S. 822, 15 L.Ed.2d 67 (1965). The Court stated that “[i]f plaintiffs were permitted to recover for impairment of property value, because of the circuitry of travel thereto and therefrom and the dwindling of traffic by their property, resulting from the street obstruction, practically every property owner in a town could recover for the same reasons when the Highway Commission constructs a by-pass to expedite traffic.” *Id.* at 682, 140 S.E.2d at 380. In *Smith v. Highway Commission*, 257 N.C. 410, 414, 126 S.E.2d 87, 90 (1962), the Court stated that the “[i]ncidental interference with the abutting owner’s easements of light, air, and access by reason of the change of grade [on the road] does not entitle him to compensation”

For its argument, plaintiff fails to provide any statutory basis or authority for a governmental taking based upon the “right to be seen.” As support for its argument that the complaint sufficiently states a claim for the taking of its property, plaintiff cites the *Advertising Co.* case. However, that case, which also addressed the question of whether the complaint stated a claim for relief, is distinguishable from the instant case since it involved *the cutting down* of plaintiff’s billboard. *Advertising Co.*, 50 N.C. App. at 154, 272 S.E.2d at 923.

Plaintiff fails also to present any compelling reason why we should find a basis or authority for a taking based upon the “right to be seen,” and we refuse to do so. We rule, therefore, that the obstruction of view of plaintiff’s billboards due to the vegetation

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and trees planted by DOT as part of the highway beautification project does not amount to a taking of plaintiff's property. The trial court properly dismissed plaintiff's complaint for failure to state a claim.

Affirmed.

Judges WELLS and ORR concur.

ELTON H. BYNUM, PLAINTIFF v. FREDRICKSON MOTOR EXPRESS
CORPORATION, DEFENDANT

No. 9227SC905

(Filed 21 September 1993)

**Master and Servant § 87 (NCI3d)— Workers' Compensation Act
exclusive remedy—defendant's alleged misconduct intentional
—complaint insufficient to establish subject matter jurisdiction**

Plaintiff's complaint failed to state a claim against defendant employer under *Woodson v. Rowland*, 329 N.C. 330, where plaintiff alleged that he was operating a forklift on the back of a truck; a co-worker moved the truck, causing plaintiff and the forklift to fall to the ground; the co-worker had previously engaged in a negligent act which resulted in serious injury to another employee; and defendant employer had retained the co-worker without retraining him or providing safety instructions to him.

Am Jur 2d, Master and Servant §§ 139, 140.

Appeal by plaintiff from an order setting aside entry of default and default judgment in plaintiff's favor entered 30 July 1992 in Gaston County Superior Court by Judge Robert P. Johnston. Heard in the Court of Appeals 1 September 1993.

This action was commenced by plaintiff on 5 February 1992, alleging that plaintiff suffered personal injuries when the trailer in which he was operating a forklift was moved by a co-worker causing plaintiff and the forklift to fall six feet to the ground. Plaintiff filed a workers' compensation claim and brought this action

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against defendant. In his complaint, plaintiff alleged that defendant, by failing to retrain or discharge the co-worker who caused plaintiff's injuries with knowledge of previous accidents involving this same co-worker, intentionally engaged in misconduct knowing it was substantially certain to cause serious injury.

Defendant notified its workers' compensation carrier, Amerisure Insurance Company (Amerisure), of both the workers' compensation claim and the civil complaint on the day defendant received the complaint. Amerisure assumed responsibility for the workers' compensation complaint but did not attempt to represent defendant in this action. Defendant did not obtain separate representation, and no answer or other responsive pleading was filed in this case. Plaintiff obtained entry of default, and on 3 April 1992 default judgment in the amount of \$800,000 was entered against defendant.

Defendant's Rule 60(b) motion to set aside entry of default and default judgment was granted and plaintiff appeals.

Don H. Bumgardner and William K. Goldfarb for plaintiff-appellant.

Jones, Hewson & Woolard, by R.G. Spratt, III and Harry C. Hewson; and Constangy, Brooks & Smith, by John J. Doyle, Jr., for defendant-appellee.

WELLS, Judge.

The trial court granted defendant's motion to set aside the default judgment pursuant to N.C. Gen. Stat. § 1A-1, Rule 60(b) of the Rules of Civil Procedure, on the grounds of excusable neglect. The question of subject matter jurisdiction was presented to but not ruled upon by the trial court. Defendant argues in his brief that the trial court lacked subject matter jurisdiction because plaintiff's exclusive remedy for his alleged injuries was under our Workers' Compensation Act, and therefore the judgment below is void and of no effect.

Our Workers' Compensation Act provides:

Every employer subject to the compensation provisions of this Article shall secure the payment of compensation to his employees in the manner hereinafter provided; and while such security remains in force, he or those conducting his busi-

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ness shall only be liable to any employee for personal injury . . . by accident to the extent and in the manner herein specified.

N.C. Gen. Stat. § 97-9.

Section 97-10.1 provides:

If the employee and the employer are subject to and have complied with the provisions of this Article, then the rights and remedies herein granted to the employee . . . shall exclude all other rights and remedies of the employee . . . as against the employer at common law or otherwise on account of such injury

N.C. Gen. Stat. § 97-10.1.

There is no dispute that plaintiff and defendant in this case are subject to the provisions of the Workers' Compensation Act. Plaintiff contends, however, that he has stated a claim under the exception to the exclusivity provisions under the Act recognized by our Supreme Court in *Woodson v. Rowland*, 329 N.C. 330, 407 S.E.2d 222 (1991). Accordingly, we must review the factual allegations in the plaintiff's complaint against the *Woodson* rule.

Plaintiff alleged in his complaint:

5. That while the plaintiff was in the trailer picking up freight and starting back out of the trailer, the said co-employee . . . [Wilkerson] got in the truck attached to the trailer and without checking as to the position of the plaintiff, drove the trailer away from the dock causing the plaintiff to pitch forward out of the trailer onto the pavement in the forklift that he was operating causing serious, permanent and grievous injury to his body.

6. That the defendant, Fredrickson Motor Lines, was negligent to such an extent that they knew, or should have known, that their employee, Wilkerson's conduct was substantially certain to cause serious injury or death to employees and that said conduct on behalf of the employer was intentional in the following respects:

(a) The defendant, employer knew of the propensity of its employee, Wilkerson to act without caution or circumspect [sic] in his working with co-workers and that

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the said co-worker had had a previous act of negligence which resulted in serious injury to a co-worker and that afterwards the defendant failed to discharge the said Wilkerson employee, failed to properly retrain the employee, failed to provide substantial safety guidelines for their fellow employees, and failed to warn and remonstrate with the defendant, co-employee, Wilkerson.

7. That the defendant's act in failing to correct the employee and to provide a safe working environment for those forced to work with the employee, Wilkerson, was an act of intentional misconduct entitling the plaintiff to recovery.

In *Woodson*, our Supreme Court held that:

[W]hen an employer intentionally engages in misconduct knowing it is substantially certain to cause serious injury or death to employees and an employee is injured or killed by that misconduct, that employee, or the personal representative of the estate in case of death, may pursue a civil action against the employer. Such misconduct is tantamount to an intentional tort, and civil actions based thereon are not barred by the exclusivity provisions of the Act.

Woodson, supra.

The reasoning underpinning the Court's holding in *Woodson* is helpful to our resolution of this case.

Our holding is consistent with general concepts of tort liability outside the workers' compensation context. The gradations of tortious conduct can best be understood as a continuum. The most aggravated conduct is where the actor actually intends the probable consequences of his conduct. One who intentionally engages in conduct knowing that particular results are substantially certain to follow also intends the results for purposes of tort liability. Restatement (Second) of Torts § 8A and comment b (1965) (hereinafter "Rest. 2d of Torts"). "[I]ntent is broader than a desire to bring about physical results. It extends not only to those consequences which are desired, but also to those which the actor believes are substantially certain to follow from what the actor does." W. Keeton, D. Dobbs, R. Keeton & D. Owen, *Prosser and Keeton on Torts* § 8, at 35 (5th ed. 1984) (hereinafter "Prosser"). This is the doctrine of "constructive intent." "As the probability that a

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[certain] consequence will follow decreases, and becomes less than substantially certain, the actor's conduct loses the character of intent, and becomes mere recklessness. . . . As the probability decreases further, and amounts only to a risk that the result will follow, it becomes ordinary negligence." Rest. 2d of Torts § 8A, comment b.

Prosser discusses the tortious conduct continuum:

Lying between intent to do harm, which . . . includes proceeding with knowledge that the harm is substantially certain to occur, and the mere unreasonable risk of harm to another involved in ordinary negligence, there is a penumbra of what has been called "quasi-intent." To this area, the words "willful," "wanton," or "reckless," are customarily applied; and sometimes, in a single sentence, all three.

In North Carolina we follow, applying our own terminology, the basic rules discussed in the Restatement and Prosser.

Woodson, supra.

"The substantial certainty standard satisfies the [Workers' Compensation] Act's purposes of providing trade-offs to competing interests and balancing these interests, while serving as a deterrent to *intentional wrongdoing* and promoting safety in the workplace." *Woodson, supra.* (Emphasis added) (Citation omitted).

Plaintiff did not file a reply brief in response to defendant's subject matter jurisdiction argument; however, at oral argument, plaintiff vigorously contended that under our well-recognized rule of "notice" pleading, he has successfully asserted a *Woodson* claim. We cannot agree. We are of the opinion, and so hold, that in cases where the exclusivity of the Act would otherwise apply [involving accidents], in order to establish subject matter jurisdiction, the complaint must reveal facts showing such dangerous or hazardous conduct or circumstances that injury was substantially certain to occur. In the case before us, this requirement has not been met.¹ It is not sufficient, as plaintiff contends, to merely allege that defendant's misconduct was "intentional."

1. We have not overlooked the language in *Woodson* which appears to recognize negligent hiring or retention of a fellow employee as a basis for a common law action for personal injury. Two of the cases cited by the Court in that context, *Pleasants v. Barnes*, 221 N.C. 173, 19 S.E.2d 627 (1942) and *Walters v. Durham*

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For the reasons stated, we are of the opinion, and so hold, that plaintiff in this case cannot maintain the claim for relief he asserted in this action.²

For lack of subject matter jurisdiction in the general courts of justice, this action must be dismissed. *See* N.C. Gen. Stat. § 7A-240 (1989).

Accordingly, we remand this case to the trial court for entry of judgment dismissing this action.

Remanded with instructions.

Judges ORR and MCCRODDEN concur.

PEGGY W. OAKLEY, ADMINISTRATRIX OF THE ESTATE OF ADRIAN EUGENE OAKLEY, PLAINTIFF/APPELLANT v. DANNY JOE THOMAS, DEFENDANT/APPELLEE

No. 9218SC935

(Filed 21 September 1993)

Insurance § 528 (NCI4th) — decedent struck by bus — recovery from board of education — recovery from bus driver and UIM carrier not barred

In a wrongful death action where plaintiff's decedent was killed when he was struck by a school bus, plaintiff's recovery against the Randolph County Board of Education pursuant to the North Carolina Tort Claims Act did not bar plaintiff's claims against the individual bus driver who caused the wreck

Lumber Co., 163 N.C. 536, 80 S.E. 49 (1913) did not address or deal with the exclusivity of the Workers' Compensation Act. The third case cited by the Court, *Hogan v. Forsyth Country Club Co.*, 79 N.C. App. 483, 340 S.E.2d 116, *disc. rev. denied*, 317 N.C. 334, 346 S.E.2d 140 (1986) involved a sexual harassment claim, and this Court there held that because such activity did not arise out of or occur within the scope of the fellow employee's employment, the claim was neither covered nor barred by the Act.

2. For a helpful discussion of *Woodson* and its implications, *see*, David L. Lambert, Comment, *From Andrews to Woodson and Beyond: The Development of the Intentional Tort Exception to the Exclusive Remedy Provision-Rescuing North Carolina Workers From Treacherous Waters*, 20 N.C. Cent. L.J. 164 (1992).

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or decedent's UM/UM carrier for damages in excess of the maximum recovery allowable under the Tort Claims Act; however, a stipulation by the Board of Education that plaintiff's damages were in excess of \$100,000 did not bind the bus driver or decedent's insurance carrier, as they were not parties to the action, and only if plaintiff is able to prove at trial that her damages are in excess of \$100,000 (the amount already recovered from the Industrial Commission action) will she be entitled to an additional award.

Am Jur 2d, Automobile Insurance §§ 295, 298.

Appeal by plaintiff from order entered 19 May 1992 by Judge Judson D. DeRamus, Jr., in Guilford County Superior Court. Heard in the Court of Appeals 2 September 1993.

On 31 October 1989, defendant Danny J. Thomas was employed by the Randolph County Board of Education as a bus driver. The bus driven by Mr. Thomas struck and killed Adrian E. Oakley, who was riding a motorcycle insured by Harleysville Mutual Insurance Company (hereinafter "Harleysville Insurance").

Plaintiff filed two actions. Plaintiff filed a claim against the Randolph County Board of Education under the North Carolina Tort Claims Act. *See* G.S. 143-291 *et seq.* Additionally, on 18 December 1990 plaintiff filed a complaint in Superior Court (No. 90-CvS-11165) against Mr. Thomas alleging negligence resulting in the wrongful death of Mr. Oakley. G.S. 28A-18-1. (The unnamed defendant in that action is Harleysville Insurance, decedent's uninsured/underinsured (UM/UM) insurance carrier.)

On 5 May 1992, a Deputy Commissioner of the North Carolina Industrial Commission ruled (in I.C. No. TA-12000, *Peggy W. Oakley, Personal Representative of the Estate of Adrian Eugene Oakley, Deceased v. Randolph County Board of Education*) that decedent's death was proximately caused by the negligence of Mr. Thomas (who was acting within the course and scope of his employment) and ordered defendant Randolph County Board of Education to pay plaintiff the maximum permitted by law, \$100,000.00. G.S. 143-300.1(a); G.S. 143-299.2. The 5 May 1992 decision and order also reflects that the parties (plaintiff and the Randolph County Board of Education) stipulated that "[t]he damages resulting from the death of Adrian Oakley exceed \$100,000.00." Plaintiff received

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and accepted a \$100,000.00 check from the State of North Carolina in satisfaction of the Industrial Commission award. G.S. 143-300.1(c).

On 6 May 1992, plaintiff filed a motion for partial summary judgment against defendants on the issue of liability in this action (90-CvS-11165). On 8 and 15 May 1992, defendants also filed motions for summary judgment in this action (90-CvS-11165).

On 19 May 1992, the trial court denied plaintiff's motion for summary judgment on the issue of liability. The trial court granted summary judgment for defendants and dismissed plaintiff's claims with prejudice. Plaintiff appeals.

Stern, Graham & Klepfer, by Donald T. Bogan, and Hodgman, Elam, Gordon & Churchill, by John C. Elam, for plaintiff-appellant.

Attorney General Lacy H. Thornburg, by Special Deputy Attorney General E. H. Bunting, Jr., for defendant-appellee.

Teague, Rotenstreich and Stanaland, by Stephen G. Teague, for unnamed defendant Harleysville Mutual Insurance Company.

EAGLES, Judge.

I.

Plaintiff contends that her "recovery against the Randolph County Board of Education pursuant to the North Carolina Tort Claims Act does not bar Oakley's [plaintiff's] claims against the individual bus driver who caused the wreck, or Oakley's UM/UM carrier for damages in excess of the maximum recovery allowable under the Tort Claims Act." We agree.

The North Carolina Industrial Commission has "jurisdiction to hear and determine tort claims against any county board of education . . . which claims arise as a result of . . . any alleged negligent act or omission of the driver of a public school bus . . ." G.S. 143-300.1(a). Here, plaintiff's damages may exceed the maximum award of \$100,000.00 available under the Tort Claims Act. G.S. 143-299.2. The issue is whether plaintiff can recover the remaining damages in excess of \$100,000.00 resulting from decedent's death from a non-governmental source, namely decedent's insurance carrier.

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This case is essentially a contract dispute between decedent's estate and Harleysville Insurance. Plaintiff may have suffered damages in excess of the maximum recovery allowed against the board of education by law, and the limitation of that recovery may leave plaintiff with unsatisfied actual damages. By offering coverage for decedent in the event of damage arising from the acts of a tortfeasor who could not pay for the damages, defendant Harleysville Insurance accepted premiums in exchange for a commitment to provide payment for those unsatisfied damages. See *N.C. Farm Bureau Mut. Ins. Co. v. Knudsen*, 109 N.C. App. 114, 117, 426 S.E.2d 88, 90, *disc. rev. denied*, 334 N.C. 165, 432 S.E.2d 365 (1993) (holding that a public school bus is an underinsured motor vehicle as "the Tort Claims Act serves the same function as liability insurance for school buses"). Accordingly, we reverse the trial court's entry of summary judgment against plaintiff. *Accord Karlson v. City of Oklahoma City*, 711 P.2d 72, 74-75 (Okla. 1985) (holding that "in a situation where the liability of a tortfeasor is limited by the Political Subdivisions Tort Claims Act, to an amount which will not compensate an insured for all his proven losses suffered in an automobile accident, that insured may recover from his insurer through the uninsured/underinsured motorist provisions of his automobile liability insurance, according to the terms thereof"); see also *Gabriel et al v. Minn. Mut. Fire & Casualty*, No. Civ. 930046, Civ. 930047, Civ. 930048, 1993 W.L. 338616 (N.D. Sept. 8, 1993); *Michigan Millers Mut. Ins. Co. v. Bourke*, 607 So.2d 418 (Fla. 1992).

However, we note that in the Industrial Commission action, only the board of education stipulated that plaintiff's damages were in excess of \$100,000.00: Mr. Thomas and Harleysville Insurance (defendants in 90-CvS-11165) were not parties to the Industrial Commission action and did not stipulate as to plaintiff's damages. See G.S. 143-300.1(a) (North Carolina Industrial Commission has jurisdiction to hear and determine tort claims against a county board of education arising as a result of an alleged negligent act or omission of the driver of a public school bus); G.S. 143-300.1(d) ("The Attorney General may defend any civil action which may be brought against the driver of a public school bus . . ." and ". . . is authorized to pay any judgment rendered in such civil action not to exceed the limit provided under the Tort Claims Act"). Accordingly, only if plaintiff is able to prove at trial that plaintiff's total damages are in excess of \$100,000.00 (the amount

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already recovered from the Industrial Commission action) will plaintiff be entitled to an additional award as a result of this action (90-CvS-11165).

II.

Plaintiff argues that “[t]he bus driver and the UM/UM carrier are collaterally estopped from re-litigating liability issues previously decided against them in a tort claims action against the owner of the bus arising from the same collision.” This Court’s review is limited to the assignments of error set forth in the record on appeal. N.C.R. App. P. 10(a). This contention was not set forth in plaintiff’s assignments of error. Accordingly, we do not address this argument since it falls outside the scope of review on appeal. *Id.* Additionally, we note that defendants have not cross-appealed.

III.

For the reasons stated, we reverse the trial court’s entry of summary judgment against plaintiff and remand the cause for further proceedings.

Reversed and remanded.

Judges GREENE and LEWIS concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 21 SEPTEMBER 1993

BRADLEY CO. v. TOWN OF CHAPEL HILL No. 9215SC729	Orange (91CVS1826)	Reversed & Remanded
CHURCH v. FUNK No. 9223SC889	Ashe (91CVS92)	Affirmed
EDWARDS v. EDWARDS No. 9118SC1299	Guilford (87CVD1755)	Affirmed
IN RE SMITH No. 9222DC345	Davie (91J39)	Affirmed
LEWIS & CLARK REALTORS v. DAVIS No. 9218SC934	Guilford (91CVD3116)	Affirmed
McLEOD v. SKINNER No. 9211SC678	Lee (88CVS137)	No Error
N.C. DEPT. OF LABOR v. CASEBOLT No. 9210SC440	Wake (91CVS4887)	Affirmed
REID v. REID No. 9215DC944	Alamance (87CVD454)	Affirmed
RICE v. RICE No. 9214DC780	Durham (87CVD1414) (88CVD3735)	Affirmed in part. Vacated in part.
STATE v. BARTLETT No. 9217SC491	Rockingham (90CRS9931) (90CRS9932) (90CRS9933) (91CRS483) (91CRS484) (91CRS485)	No Error
STATE v. COUNCIL No. 9310SC321	Wake (92CRS65499) (92CRS65450)	No Error
STATE v. CREECH No. 935SC153	Pender (92CRS109)	No Error
STATE v. DUDLEY No. 928SC965	Lenoir (91CRS11955)	No Error
STATE v. FRANKS No. 9321SC282	Forsyth (92CRS16244)	No Error

STATE v. GERSCH No. 9310SC240	Wake (91CRS94105)	Appeal Dismissed
STATE v. GILLIAM No. 9312SC248	Cumberland (92CRS6654)	No Error
STATE v. GRISSETTE No. 9226SC1021	Mecklenburg (91CRS6227)	No Error
STATE v. HICKS No. 937SC173	Wilson (89CRS6059) (89CRS6060)	No Error
STATE v. HODGE No. 9223SC1245	Alleghany (91CRS550)	No Error
STATE v. PATRICK No. 9223SC834	Wilkes (90CRS5458) (90CRS5459) (90CRS5460) (90CRS5461)	No Error
STATE v. SMITH No. 9113SC1074	Columbus (90CRS4105)	No Error
STATE v. STEWART No. 9226SC1273	Mecklenburg (89CRS43637)	Remanded
STATE v. TATE No. 9326SC166	Mecklenburg (91CRS39937) (91CRS39939) (91CRS39941) (91CRS39942)	No Error
STATE v. WILSON No. 931SC316	Chowan (87CRS295)	No error; remanded for correction of judgment.
SYRO STEEL CO. v. S. T. WOOTEN CONSTRUCTION CO. No. 926DC704	Northampton (91CVD281)	Affirmed

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STATE OF NORTH CAROLINA v. TIMOTHY MICHAEL ALMOND

STATE OF NORTH CAROLINA v. MICHAEL A. ALMOND

No. 9223SC885

(Filed 5 October 1993)

1. Appeal and Error § 155 (NCI4th)— consolidation of two indictments—issue not properly before court—no plain error

Defendant's contention that the consolidation of two indictments against him into one count was improper because nothing in the Criminal Procedure Act allowed indictments to be consolidated was not properly before the court on appeal where defendant failed to object to the consolidation, and consolidation did not amount to plain error in light of the fact that it reduced defendant's risk of conviction from two counts with possible imprisonment of twenty years to one count with possible imprisonment of ten years, and defendant failed to offer any authority in favor of this assignment of error.

Am Jur 2d, Appeal and Error § 562 et seq.

2. False Pretenses, Cheats, and Related Offenses § 5 (NCI4th)— obtaining property by false pretenses—consolidation of indictments—defendant not denied right to unanimous verdict

There was no merit to defendant's contention that, by consolidating two indictments for obtaining property by false pretenses into one count, the trial court denied defendant his right to a unanimous verdict because of the potential for disagreement between the jurors as to the person with whom defendant conspired, since the gravamen of the offense of conspiracy to obtain property by false pretenses is not the conduct of defendant, but his intent or purpose in attempting to obtain property by false pretenses; a unanimous verdict was required only as to the offense of conspiracy to obtain property by false pretenses and not to the persons with whom defendant conspired; and N.C.G.S. § 14-100, the statute under which defendant was convicted, does not enumerate any specific activities which are separately punishable.

Am Jur 2d, False Pretenses § 60 et seq.

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- 3. False Pretenses, Cheats, and Related Offenses § 18 (NCI4th) — obtaining property by false pretenses — invoicing goods not received — inflated invoices — misrepresentations — connection between misrepresentations and defendant's kickbacks — sufficiency of evidence**

In a prosecution of defendant for obtaining property by false pretenses, there was no merit to defendant's contention that there was insufficient evidence of misrepresentation or that, even if misrepresentations did occur, then there was no causal relationship between the misrepresentations and his receipt of any moneys, since defendant, as purchasing agent for his company, was authorized to approve payment of all expenses on behalf of the company; the submission of invoices for goods not received was therefore a misrepresentation; defendant as purchasing agent was responsible for obtaining the best price possible; every time he approved or authorized an invoice to be paid, he was making an implicit representation that he had obtained the best possible price and not one that was 20% above normal; defendant's company would not have paid the inflated invoices but for defendant's approval of such; and it was the company's payment of these inflated invoices which allowed defendant to receive his kickback.

Am Jur 2d, False Pretenses § 70 et seq.

- 4. Indictment, Information, and Criminal Pleadings § 30 (NCI4th) — failure to allege county where offense occurred — motion to quash denied — no error**

The trial court did not err in denying defendant's motion to quash an indictment because it failed to allege in the body thereof the county in which the alleged activities took place where this indictment and all other indictments against defendant were captioned as from Wilkes County; all other indictments contained the phrase "in the county named above"; this indictment charged defendant with obtaining money by false pretenses from a named corporation, and the corporation is located in Wilkes County; and sufficient information was thus contained in the indictment to confer jurisdiction on the Wilkes County grand jury and to inform defendant that the charges against him arose from activities in Wilkes County.

Am Jur 2d, Indictments and Informations §§ 122, 123.

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5. Evidence and Witnesses § 2452 (NCI4th)— subpoenas duces tecum—attempt to circumvent discovery—quashal proper

The trial court did not err in quashing a portion of defendants' subpoenas duces tecum where the trial court properly determined that the subpoenas were really discovery devices intended to circumvent the normal discovery process.

Am Jur 2d, Witnesses § 22.

6. Appeal and Error § 447 (NCI4th)— trial court's communications with prosecutor—issue raised for first time on appeal

Defendants could not raise for the first time on appeal their objection to the trial court's *ex parte* communications with the prosecutor while defense counsel was outside the courtroom.

Am Jur 2d, Appeal and Error § 702 et seq.

Judge GREENE concurring in part and dissenting in part.

Appeal by defendants from judgments and commitments entered 28 February 1992 by Judge Marcus Johnson in Wilkes County Superior Court. Heard in the Court of Appeals 16 June 1993.

Attorney General Lacy H. Thornburg, by Special Deputy Attorney General Lars F. Nance, for the State.

Wilson, Palmer, Lackey and Starnes, P.A., by W.C. Palmer and Wesley E. Starnes, for defendants-appellants.

LEWIS, Judge.

Defendant Michael Almond was indicted on three counts of obtaining property by false pretenses and three counts of conspiracy to commit false pretenses. Defendant Timothy Almond was indicted on two counts of conspiracy to commit false pretenses. The jury returned guilty verdicts on all counts and defendants appealed.

The evidence presented below tended to show that Michael Almond worked as the purchasing agent for Carolina Mirror Corporation ("CMC"). Throughout the time period relevant to this appeal, CMC was in the business of manufacturing mirrors and as part of its manufacturing process, CMC purchased various items and services from Minton Electric and Carolina Glue Chip ("CGC").

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The businesses of CMC and CGC were closely linked with CGC providing most of the glass used in the production of CMC's mirrors. Conversely, CMC was CGC's main customer. Thus, due to his position as purchasing agent, Michael Almond maintained a very close relationship with CGC. In fact Michael Almond co-founded CGC with Jerry Minton but remained a silent partner.

At trial, the State presented evidence that Michael Almond was directly involved in a kickback scheme with Jerry Minton, in which Minton Electric charged prices 40% over cost to CMC instead of the customary 20% charged to other customers. Cash, loans and tangible personal property were given to Michael Almond in exchange for his role in the kickback scheme. The State also contended that Michael Almond caused CMC to purchase glue from Sutton Supply when in fact no glue was ever delivered to CMC. Employees at CMC testified that glue was never used in any of its processes and there was no reason to purchase such. The glue, in fact, though paid for by CMC was actually delivered to CGC.

Tim Almond, Michael Almond's son, was also indicted for his role in the kickback scheme as a co-conspirator. Many of the kickback payments delivered to Michael Almond were paid to a company called TMA Sales, whose sole purpose was to receive the illegal payments. Tim Almond's responsibility was to pick up the payments from Jerry Minton and deliver them to Michael Almond. For his part, Tim Almond received an auto loan and also an all expense paid trip to England.

In his defense, Michael Almond attempted to offer evidence to show that his supervisors were aware that CMC was paying to have glue shipped to CGC because CMC was actively involved in assisting CGC due to CMC's reliance on CGC's glass for the production of its mirrors. Further, Michael Almond contended that for any glue which CMC paid to have delivered to CGC, it received compensation in the form of services. Michael Almond also asserted that CMC was aware of his interest in CGC and that any payments he received from CGC were merely compensation for his time and energy.

Counsel has submitted a single brief on behalf of both defendants combining several assignments of error peculiar to the individual defendants. The first two assignments of error, dealing with Tim Almond, are substantially related and we have chosen

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to address them together. The first assignment of error contends that the trial court denied Tim Almond his right to a unanimous verdict by submitting the two conspiracy indictments to the jury together. The second assignment of error alleges that the trial court erred in combining the two indictments together. We will address these issues in the order in which they arose during trial.

[1] The first indictment charged Tim Almond with “conspir[ing] with John Minton, Jerry Minton, doing business as Minton Electric, Michael A. Almond and others to commit the felony of obtaining property by false pretenses. . . .” In contrast, the second indictment alleged that Tim Almond “conspire[d] with Jerry Minton, doing business as Carolina Glue Chip, and Michael A. Almond and others to commit the felony of obtaining property by false pretenses. . . .” However, at the conclusion of the State’s evidence, the State decided, and the trial court consented, to combine the conspiracy indictments into a single count. Although not specifically denominated as such, we will treat the State’s request as a motion to consolidate. It is Tim Almond’s contention that the consolidation of the indictments was improper because nothing in the Criminal Procedure Act allows indictments to be consolidated. We disagree.

Before we may address the merits of this assignment of error, we must first determine whether the issue has been properly preserved for appeal. After reviewing the record it is clear that defendant, represented by competent counsel, failed to object to the consolidation of the indictments. Nothing else appearing this assignment of error would be improper because it is well established that an issue may not be raised for the first time on appeal. See *State v. Oliver*, 309 N.C. 326, 307 S.E.2d 304 (1983) (failure to object at trial constitutes waiver on appeal). However, since defendant’s first two assignments of error overlap and since defendant has asserted a plain error exception in the first assignment of error, we have undertaken a review of the record to determine if plain error applies to this assignment of error.

The plain error exception was first adopted by our Supreme Court in *State v. Odom*, 307 N.C. 655, 300 S.E.2d 375 (1983). In *Odom*, the Supreme Court quoted from the Fourth Circuit’s opinion in *United States v. McCaskill*, 676 F.2d 995 (4th Cir.), *cert. denied*, 459 U.S. 1018, 74 L.Ed. 2d (1982), and held that:

[T]he plain error rule . . . is always to be applied cautiously and only in the exceptional case where, after reviewing the

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entire record, it can be said the claimed error is a “*fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done,” or “where [the error] is grave error which amounts to a denial of a fundamental right of the accused,” or the error has “‘resulted in a miscarriage of justice or in the denial to appellant of a fair trial’” or where the error is such as to “seriously affect the fairness, integrity or public reputation of judicial proceedings” or where it can be fairly said “the instructional mistake had a probable impact on the jury’s finding that the defendant was guilty.”

Odom at 660, 300 S.E.2d at 378 (citations omitted). Recently, the Supreme Court has reexamined the plain error exception in *State v. Collins*, 334 N.C. 54, 431 S.E.2d 188 (1993). Therein, the Supreme Court reemphasized the fact that plain error occurs only in “rare cases” where the error is “so fundamental as to amount to a miscarriage of justice or which probably resulted in the jury reaching a different verdict than it otherwise would have reached.” *Id.* at 62, 431 S.E.2d at 193 (citations omitted). We do not believe that this is one of those rare cases.

We note at the outset that defendant was represented by counsel when the State moved to consolidate the indictments and defendant’s counsel did not object. The reason for this is readily apparent. Prior to the consolidation of the indictments Tim Almond faced two possible convictions, each carrying a maximum of ten years imprisonment. After the consolidation, Tim Almond was at risk only for a single count of conspiracy carrying a maximum of ten years imprisonment. Thus, the consolidation of the indictments was not prejudicial to defendant, but rather beneficial to him. It is also easy to understand why the State sought to consolidate the indictments against Tim Almond. Because of the overlap in the evidence, there was the potential for confusion among the jurors between the two conspiracies. However, once the indictments were consolidated, the State was left with one readily understood count of conspiracy capable of proof by multiple means.

In addition, we note that Tim Almond has failed to offer any authority in favor of this assignment of error. *See Byrne v. Bordeaux*, 85 N.C. App. 262, 354 S.E.2d 277 (1987). We do not believe that Tim Almond’s bald assertion of the Criminal Procedure Act meets the requirements of N.C.R.App. P. 28(b)(5) because as stated in

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S.J. Groves & Sons & Co. v. State, 50 N.C. App. 1, 273 S.E.2d 465 (1980), *disc. rev. denied*, 302 N.C. 396, 279 S.E.2d 353 (1981), this Court will not “‘fish out’ an appellant’s exception which is not properly presented.” *Id.* at 69, 273 S.E.2d at 501. Taking all of these factors into consideration, we find no plain error. Defendant’s second assignment of error is dismissed.

We now turn to Tim Almond’s first assignment of error in which he contends that the trial court erred in submitting the consolidated indictments to the jury together in that this deprived him of his constitutional right to a unanimous verdict. However, before addressing the merits of this assignment of error, we must again determine whether the issue has been properly preserved. Rule 10(b)(2) of the North Carolina Rules of Appellate Procedure provides:

A party may not assign as error any portion of the jury charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly that to which he objects and the grounds of his objection;

It is undisputed that defendant failed to object to the trial court’s instructions to the jury submitting the consolidated indictments together to the jury as one count. However, Tim Almond asserts that this was plain error. Because the error was such that defendant was potentially deprived of his fundamental right to a unanimous verdict, we have decided to address the merits of this assignment of error.

[2] Tim Almond argues that by consolidating the indictments the trial court denied him his right to a unanimous verdict because of the potential for disagreement between the jurors as to whom he conspired. We disagree and find the facts of this situation analogous to those in *State v. Hartness*, 326 N.C. 561, 391 S.E.2d 177 (1990). There, our Supreme Court upheld a conviction for indecent liberties even though the trial court had charged the jury in an ambiguous manner that allowed for disagreement among the jurors as to the immoral acts committed by the defendant. The Supreme Court stated that: “Even if we assume that some jurors found that one type of sexual conduct occurred and others found that another transpired, the fact remains that the jury as a whole would unanimously find that there occurred sexual conduct within the ambit of ‘any immoral, improper, or indecent liberties.’” *Id.* at 565, 391 S.E.2d at 179. In reaching its decision the Supreme

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Court distinguished its previous decision in *State v. Diaz*, 317 N.C. 545, 346 S.E.2d 488 (1986). The Supreme Court concluded that the jury instructions in *Diaz* were improper because they allowed the jury to convict the defendant if they found that he either possessed or transported drugs. Such an instruction was erroneous because the drug trafficking statute enumerated specific activities, each of which was punishable separately. In contrast, the statute on indecent liberties, which was construed in *Hartness*, merely prohibited immoral, improper or indecent liberties but not any specific activities which were punishable separately.

Since *Diaz* and *Hartness*, our Supreme Court has revisited the issue of unanimous jury verdicts in *State v. Lyons*, 330 N.C. 298, 412 S.E.2d 308 (1991) (4-3 decision). In *Lyons*, the Supreme Court remanded a secretive assault charge for a new trial because the trial court's disjunctive instructions allowed the jurors to disagree as to which victim defendant assaulted. In reaching its decision, the Court reviewed both *Diaz* and *Hartness* and stated:

The former line of cases (*Diaz*) establishes that a disjunctive instruction, which allows the jury to find a defendant guilty if he commits either of two underlying acts, *either of which is in itself a separate offense*, is fatally ambiguous because it is impossible to determine whether the jury unanimously found that the defendant committed one particular offense. The latter line (*Hartness*) establishes that if the trial court merely instructs the jury disjunctively as to various alternative acts *which will establish an element of the offense*, the requirement of unanimity is satisfied.

Lyons, 330 N.C. at 302-303, 412 S.E.2d at 312 (emphasis in original). Thus, the difference is whether the two underlying acts are separate offenses or whether they are merely alternative ways to establish a single offense. Applying this test, the Supreme Court held that the trial court erroneously "permitt[ed] consideration in one issue of two possible crimes for which defendant could be separately convicted and punished." *Id.* at 306, 412 S.E.2d at 314. The dissent would have us believe that the present matter falls within the above quoted language, but a complete examination of *Lyons* shows that it does not.

In *Lyons*, Justice Whichard went on to stress the importance of examining the gravamen of the offense which the legislature intended to prevent. In *Lyons*, it was held that the "gravamen

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of the offense of maliciously assaulting in a secret manner is the assaulting of a particular individual in that manner." *Id.* at 307, 412 S.E.2d at 314. The gravamen of the offense in *Hartness* was not the conduct of the defendant, but his intent or purpose. *Id.* In the present matter, we find the gravamen of the offense of conspiracy to obtain property by false pretenses is not the conduct of Tim Almond, but his intent or purpose in attempting to obtain property by false pretenses, further showing the appropriateness of the *Hartness* line of cases to this situation.

Lastly, Justice Whichard examined the wording of N.C.G.S. § 14-31 to show that *Diaz* was appropriate. This section provides:

If any person shall in a secret manner maliciously commit an assault and battery with any deadly weapon upon another by waylaying or otherwise, with intent to kill such other person, notwithstanding the person so assaulted may have been conscious of the presence of his adversary, he shall be punished as a Class F felon.

N.C.G.S. § 14-31 (1986). The Supreme Court relied on the phrases "such other person" and "the person so assaulted" as "clearly indicative of legislative intent that to find a defendant guilty of this offense, the jury must find unanimously that he committed the assault on a particular individual." *Lyons*, 330 N.C. at 309, 412 S.E.2d at 315-16. No such similar language appears in the statute concerning obtaining property by false pretenses. Instead N.C.G.S. § 14-100 makes punishable any act by which a person obtains or attempts to obtain "money, goods, property, services, chose in action, or other thing of value with intent to cheat or defraud *any person* of such money, goods, property, services, chose in action or other thing of value." (Emphasis added). Unlike the offense in *Lyons*, N.C.G.S. § 14-100 uses the term "any person" instead of limiting the offense to a particular individual. This is further evidence that a unanimous verdict was required only as to the offense of conspiracy to obtain property by false pretenses and not to the persons with whom Tim Almond conspired.

Thus, after thoroughly reviewing the relevant case law we find this case more analogous to *Hartness*. Nowhere does the statute enumerate any specific activities which are separately punishable. Even though it is possible that the jurors could have disagreed as to whether or not Tim Almond conspired with John Minton, the jurors were at least unanimous that Tim Almond conspired

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with Michael Almond and Jerry Minton to obtain money by false pretenses since these individuals were mentioned in both indictments. It does not matter that different companies were named in the indictments because conspiracy requires an agreement between two or more individuals to do an illegal act. *See State v. Massey*, 76 N.C. App. 660, 334 S.E.2d 71 (1985). It stands to reason that Tim Almond could not conspire with the companies named in the indictments but only with the individuals which represented those companies. This is exactly what the jury found in its verdict. Accordingly, we find this argument to be without merit.

[3] The third argument contends that the trial court erred in refusing to grant defendants' motion to dismiss at the close of all the evidence. We must determine whether or not there was substantial evidence of each element of the offense charged and of defendant being the perpetrator. *State v. Bates*, 309 N.C. 528, 308 S.E.2d 258 (1983). In making this determination, the evidence is considered in the light most favorable to the State, with the State receiving the benefit of every reasonable inference that can be drawn from the evidence. *State v. Cooley*, 47 N.C. App. 376, 268 S.E.2d 87, *disc. rev. denied*, 301 N.C. 96, 273 S.E.2d 442 (1980).

The elements of obtaining property by false pretenses have been defined as "(1) a false representation of a subsisting fact or future fulfillment or event, (2) which is calculated and intended to deceive, (3) which does in fact deceive, and (4) by which one person obtains or attempts to obtain value from another." *State v. Childers*, 80 N.C. App. 236, 242, 341 S.E.2d 760, 764, *disc. rev. denied*, 317 N.C. 337, 346 S.E.2d 142 (1986). Defendants assert that the trial court's refusal to grant their motion was error because the State failed to produce any evidence on the issue of misrepresentation. We disagree. In essence, defendants argue that since Michael Almond did not affirmatively say anything to his supervisors regarding the payment of invoices and the prices which he obtained, then he did not make any misrepresentations. This argument completely ignores Michael Almond's position as purchasing agent and his authority. In their brief, defendants state that Michael Almond was authorized to approve the payment of all expenses on behalf of CMC. Given this admission, we cannot see how the submission of invoices for goods not received would not amount to a misrepresentation. Further, representatives for CMC testified that as purchasing agent, Michael Almond was responsible for obtaining the best price possible. Thus, every time Michael Almond approved or

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authorized an invoice to be paid he was making an implicit representation that he had obtained the best possible price and not one that was 20% above normal.

Michael Almond further argues that even if misrepresentations did occur then there was no causal relationship between the misrepresentations and his receipt of any moneys. In support of this argument Michael Almond cites *State v. Davis*, 48 N.C. App. 526, 269 S.E.2d 291, *disc. rev. denied*, 301 N.C. 237, 283 S.E.2d 134 (1980), wherein a town official falsified expenditure requests and obtained train tickets in return. In reversing the conviction, this Court held that the evidence was insufficient to show that the town official's misrepresentation had in any way induced the town to part with its money. In the case at hand we find sufficient evidence was produced to show that CMC would not have paid the inflated invoices but for Michael Almond's approval of such and it was CMC's payment of these inflated invoices which allowed Michael Almond to receive his kickback. We find no merit to defendants' argument.

[4] In the fourth argument, Michael Almond asserts that indictments 90-CrS-6605 and 90-CrS-6600 are fatally defective and the trial court erred when it denied his motion to quash. Michael Almond contends that indictment 90-CrS-6605 is defective because it failed to allege the county in which the alleged activities took place as required by N.C.G.S. § 15A-924(a)(3). All of the indictments against Michael Almond were captioned as from Wilkes County. Further, all of the indictments against Michael Almond, save indictment 90-CrS-6605, contained the phrase "in the county named above" to incorporate by reference that the alleged activities had taken place in Wilkes County. Although, the name of the county was omitted from the body of the indictment, we find that sufficient information was contained in the indictment to confer jurisdiction upon the Wilkes County grand jury and to inform Michael Almond that the charges against him arose from activities in Wilkes County. Indictment 90-CrS-6605 alleged that Michael Almond obtained money from CMC by false pretenses. It is undisputed that CMC is located in Wilkes County and thus Michael Almond had full knowledge of the charges against him. Further, when all of the indictments are taken together, there is no question that the activities for which Michael Almond is charged took place within Wilkes County. We see no reason to quash indictment 90-CrS-6605 for the simple reason that an omission was made in typing the indictment.

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Michael Almond also contends the trial court erred when it denied his motion to dismiss indictment 90-CrS-6600 because it failed to allege that Michael Almond "obtained or attempted to obtain anything of value." In support of this argument, Michael Almond cites *State v. Hadlock*, 34 N.C. App. 226, 237 S.E.2d 748 (1977), where this Court found an indictment insufficient when it failed to allege that the defendant obtained or attempted to obtain anything. The specific language of 90-CrS-6600 reads: "defendant named above, unlawfully, willfully and feloniously did knowingly and designedly with the intent to cheat and defraud obtain and attempt to obtain in United States money from Carolina Mirror Corporation. . . ." There is absolutely nothing ambiguous about this charge. We find that the above language was more than sufficient to give Michael Almond notice of the charge against him.

[5] Defendants next argue that the trial court erred in quashing a portion of their subpoena duces tecum. During early 1992, defendants served subpoenas on several of the officers and former employees of CMC requesting all invoices and delivery checks which CMC had from any of its suppliers from 1982 through 1990. Gary Vannoy, appearing in his capacity as private prosecutor and attorney for CMC, moved to quash the subpoenas as unduly burdensome and irrelevant. A hearing was held on the State's motion approximately two weeks prior to the trial date. Upon hearing arguments from both sides, the trial court determined that the subpoenas were really discovery devices and granted a protective order pursuant to N.C.G.S. § 15A-908. Defendants assert that this was error in that it denied them the opportunity to explore possible motives for their prosecution by CMC officials, as well as preventing them from having access to information which would show that CMC had paid inflated prices to other companies. We disagree.

It is clear that defendants did not follow the proper discovery procedures provided for in Chapter 15A. Thus, given the late date at which defendants served their subpoenas, we believe that the trial court was correct in characterizing the subpoenas as discovery devices intended to circumvent the normal discovery process. Therefore, given that the trial court has broad discretion to control discovery so as to prevent undue embarrassment and annoyance, we find that the trial court did not err. *See State v. Taylor*, 327 N.C. 147, 393 S.E.2d 801 (1990) (recognizing power of trial court to control extent and timing of disclosure of public defender's files).

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[6] Defendants have also assigned as error the fact that the trial court held *ex parte* communications with the prosecutor while defense counsel was outside the courtroom. In support of this argument, defendants cite *State v. Smith*, 326 N.C. 792, 392 S.E.2d 362 (1990), for the proposition that a defendant has the right to be present at every stage of his prosecution and such right cannot be waived. However, our review of the case law reveals that this right may be waived except in capital cases. See *State v. Tate*, 294 N.C. 189, 239 S.E.2d 821 (1978) (failure to object to conversations at the bench between judge and jurors constitutes a waiver). The record reveals that defendants have raised their objection to the bench conference with the prosecutor for the first time on appeal. Thus we deem the objection as waived and defendants' assignment of error is overruled.

Defendants' last two assignments of error concern evidentiary rulings made by the trial court. Defendants assert that the trial court erred when it allowed employees of CMC to testify about the amount of business done by CMC because improper foundations were laid for the testimony and the testimony was hearsay. N.C.G.S. § 15A-1443(a) provides that a defendant is prejudiced by errors relating to rights other than under the Constitution when there is a reasonable possibility that had the error not been committed the jury would have reached a different result. The burden of proving this is on the defendant. After reviewing the record we find that the evidentiary issues to which defendants objected were only tangential and did not affect defendants' convictions. Accordingly we find no merit to defendants' last two assignments of error.

We find that defendants received a fair trial free from prejudicial error.

No error.

Judge EAGLES concurs.

Judge GREENE dissents.

Judge GREENE concurring in part and dissenting in part.

I agree with the majority, for the reasons given, that there was no error in defendant Michael A. Almond's trial. I believe, however, defendant Timothy Almond is entitled to a new trial

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because of plain error committed in presenting only one conspiracy charge to the jury, but allowing the jury to convict on either of two conspiracy charges.

The defendant was indicted, in two separate indictments, on two counts of conspiracy. The first indictment, 90-CrS-6598, alleged that the defendant engaged in a conspiracy from November 1982 through November 1988, with "John Minton, Jerry Minton, doing business as Minton Electric, Michael A. Almond and others" to obtain money by false pretenses from Carolina Mirror Corporation and Carolina Mirror Company by invoicing Carolina Mirror inflated prices for goods sold to them by Minton Electric, the inflated profits then being split between the defendant and others. The second indictment, 90-CrS-6608, alleged that the defendant conspired with "Jerry Minton, doing business as Carolina Glue Chip, and Michael A. Almond and others" between October 1985 and April 1986 to obtain money by false pretenses from Carolina Mirror Corporation by inflating invoices for glass from Carolina Glue Chip by \$.10 per square foot to create money to kickback to the defendant and others.

The indictments allege two separate conspiracies, involving different time frames, different actors, different victims, and different methods of committing the crime. During the trial, the jury heard evidence concerning both conspiracies. The verdict form given to the jury read as follows:

We, the jury, unanimously find the defendant, Timothy Michael Almond,

_____ Guilty of Conspiracy to Obtain Property by False Pretenses
or;

_____ Not Guilty

In its instructions to the jury, the trial court instructed on the general elements of conspiracy charging that the defendant should be found guilty if those elements were established by the evidence. This general instruction and the verdict form impermissibly permitted "consideration in one issue of two possible crimes for which defendant could be separately convicted and punished": (1) the conspiracy charged in the first indictment, and (2) the conspiracy charged in the second indictment. See *State v. Lyons*, 330 N.C. 298, 306-07, 412 S.E.2d 308, 314 (1991). Accordingly "the jury could have returned a verdict of guilty without all twelve jurors agreeing" on

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which conspiracy the defendant was guilty. *Id.* Therefore the verdict is defective in that it violates defendant's constitutional right to be convicted by a unanimous jury. N.C. Const. art. I, § 24.

Contrary to the majority, I do not believe this case is controlled by *State v. Hartness*, 326 N.C. 561, 391 S.E.2d 177 (1990). *Hartness* was a case "in which a single wrong [was] established by a finding of various alternative elements." *Id.* at 566, 391 S.E.2d at 180. *Hartness* therefore is not applicable to the present case because this defendant was charged with engaging in two separate conspiracies. See *State v. Diaz*, 317 N.C. 545, 554, 346 S.E.2d 488, 494 (1986) (in trial for transporting marijuana, jury charge which allowed jury to convict defendant if it found defendant knowingly possessed or knowingly transported marijuana held error because possession and transportation are separate crimes with separate punishments).

CLAIRE B. MUNN (NOW CLAIRE BROYHILL) v. ALBERT R. MUNN, III

No. 9210DC921

(Filed 5 October 1993)

1. Appeal and Error § 210 (NCI4th)— no certificate of service of notice of appeal in record—jurisdiction of Court of Appeals—appeal treated as petition for writ of certiorari

Though the Court of Appeals did not have jurisdiction of the appeal in this case because the record on appeal did not contain a sufficient certificate of service of the notice of appeal, the Court could nevertheless treat the appeal as a petition for writ of certiorari and grant the writ.

Am Jur 2d, Appeal and Error §§ 320 et seq.; Certiorari §§ 5 et seq.

2. Divorce and Separation § 122 (NCI4th)— equitable distribution—money from wife's trust—classification proper

The trial court in an equitable distribution action did not err in classifying half the money advanced from the wife's trust as a gift to the marital estate and the other half as a debt incurred by the marital estate, requiring repayment.

Am Jur 2d, Divorce and Separation § 879.

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3. Divorce and Separation § 165 (NCI4th)— equitable distribution—rational basis

The trial court's distribution of marital property had a rational basis where it was based on findings as to the husband's salary, earning capacity, and separate liabilities; the wife's income from her trust and past discretionary disbursements from the trust; the wife's lack of employment history and skills; the wife's need as the custodial parent to use the household effects of the marital residence; the wife's contribution of separate funds to reduction of the husband's student loans; liquidity of the parties' assets; desirability of keeping the husband's medical practice intact; post-separation payments by both parties to maintain the marital residence; reduction of marital debt by the wife's trust; depreciation of the marital residence between the parties' separation and sale of the house; the husband's use of the house after the separation; the husband's conversion of marital assets and increase of marital debts with no evidence of use for marital purposes; the wife's contribution during the marriage of at least \$432,600 of separate property to the marital estate; and other findings.

Am Jur 2d, Divorce and Separation §§ 870 et seq.

4. Divorce and Separation § 399 (NCI4th)— child support—ability of father to pay half

There was sufficient evidence in the record to support the trial court's finding that appellant father, an ophthalmologist with a 1991 income of at least \$88,000, was able to pay half of his children's support, or \$1,300 per month, and the trial court gave due regard to the parties' estates, earnings, and conditions.

Am Jur 2d, Divorce and Separation §§ 1041, 1042.

5. Divorce and Separation § 399 (NCI4th)— retroactive child support—father's ability to pay—sufficiency of evidence

The trial court properly ordered appellant to pay retroactive child support for the period between the parties' separation and the date of trial where sufficient evidence existed to support the court's finding that appellant was financially able to pay half of his children's support during the time of separation.

Am Jur 2d, Divorce and Separation §§ 1041, 1042.

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Appeal by defendant from order and judgments entered 17 February 1992 by Judge Jerry W. Leonard in Wake County District Court. Heard in the Court of Appeals 2 September 1993.

Wyrick, Robbins, Yates and Ponton, by Robert A. Ponton, Jr., Bruce C. Johnson, and Charles W. Clanton, for plaintiff-appellee.

W. Brian Howell, P.A., by W. Brian Howell, for defendant-appellant.

WYNN, Judge.

[1] Preliminarily, we must decide whether we should dismiss this appeal without reaching its merits because we lack jurisdiction over it.

In *Hale v. Afro-American Arts International*, 110 N.C. App. 621, 430 S.E.2d 457 (1993) (Wynn, J., dissenting), this Court held that if the record on appeal does not contain a certificate of service of the notice of appeal, this Court does not have subject matter jurisdiction over the appeal. *Id.* at 623, 430 S.E.2d at 458. See also *Spivey and Self v. Highview Farms, Inc.*, 110 N.C. App. 719, 431 S.E.2d 535 (1993) (Cross-appeal dismissed because certificate of service of notice of appeal was not included in the record on appeal).

Here, the record on appeal contains two notices of appeal by the defendant-appellant. (R. at 108, 109). However, neither is accompanied by a certificate stating that service of this notice was made upon the plaintiff-appellee. Appellant did type a line on the bottom of the notice of appeal stating "Certificate of Service" and giving the name of the serving attorney and the date of service. However, this does not constitute adequate certification of service. The requirements of a certificate of service are well established by Rule 26 of the North Carolina Rules of Appellate Procedure. It provides:

Papers presented for filing shall contain an acknowledgement of service by the person served or proof of service in the form of a statement of the date *and manner of service* and of the names of the persons served, certified by the person who made service.

N.C.R. App. P. 26 (1992) (emphasis added). Because defendant-appellant's statement lacks a description of the manner of service, it is not a certification adequate for the record on appeal.

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Since failure to attach sufficient certification deprives this Court of jurisdiction over this appeal, we are compelled to dismiss it, unless jurisdiction can be conferred by some other means. As this Court stated in *Hale*, "If the record fails to disclose the necessary jurisdictional facts we have no authority to do more than dismiss the appeal," citing *Mason v. Moore County Bd. of Comm'rs*, 229 N.C. 626, 629, 51 S.E.2d 6, 8 (1948).

The fact that this requirement is jurisdictional carries several important implications. First, the requirement is not waivable. Jurisdiction cannot be conferred by consent, waiver, or estoppel. *In re Peoples*, 296 N.C. 109, 250 S.E.2d 890 (1978), cert. denied, *Peoples v. Judicial Standards Comm'n of N.C.*, 442 U.S. 929, 61 L.Ed.2d 297 (1979). Thus, the parties may not waive the requirement by demonstrating actual receipt of the notice of appeal or by appearing in court.

Secondly, the defect is not curable by amending the record. Because this Court does not have jurisdiction, we are unable to consider any motion to amend the record by adding a certification of service. *Anderson v. Atkinson*, 235 N.C. 300, 69 S.E.2d 603 (1952).

Thirdly, it is incumbent upon this Court in this and every case subsequent to *Hale* to examine each record of appeal to satisfy itself that the certificate of service of the notice of appeal is properly present. If this Court were to rule on an appeal in which the certificate were missing, we would be acting beyond the bounds of our jurisdiction.

This panel is bound by the *Hale* decision. *In re Appeal from Civil Penalty*, 324 N.C. 373, 379 S.E.2d 30 (1989). However, because of the important issues presented relating to the application of form over substance by the *Hale* decision, we have elected, as it is within our prerogative, to treat this appeal as a petition for writ of certiorari and grant the writ. N.C.G.S. § 7A-32(c) (1989); see *Jerson v. Jerson*, 68 N.C. App. 738, 740, 315 S.E.2d 522, 523 (1984).

Facts

This appeal involves a dispute between Claire B. Munn, now Claire Broyhill, and Albert B. Munn, III, over the equitable distribution judgment and child support order and judgment entered pursuant to their divorce.

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Defendant-appellant Albert R. Munn, III, and plaintiff-appellee Claire Broyhill Munn were married on May 18, 1985. They separated on August 1, 1990. For the first four years of their marriage, appellant was employed as a medical intern and medical resident in Wilmington, N.C. and then in Galveston, Texas. During these four years, the couple had two children, and appellee was not employed outside the home. Several years prior to the marriage, appellee established a trust, the Barbara C. Broyhill Trust, to be administered by her father as trustee, which contained substantial separate property. Throughout their marriage, the couple relied heavily on disbursements from this trust to support their standard of living, which required considerably more than appellant's annual internship and residency salaries of \$20,000-\$25,000 per year.

Upon completion of Dr. Munn's residency training in 1989, the family moved to Raleigh, North Carolina, where Dr. Munn commenced his medical practice. That same year they purchased a home in Raleigh for \$735,000. The trust contributed all of the initial financing (\$247,000 for the down payment and closing costs and \$100,700 for renovations) and the first seventeen (17) mortgage payments (\$76,168.67), for a total of \$423,868.67.

The defendant appeals from the trial court's judgment for the equitable distribution of marital property, order for prospective child support, and judgment for retroactive child support.

Trust Account Advances

[2] Appellant first contends that the trial court erred in classifying the \$423,868.67 advanced from appellee's trust to the marital estate. The trial court found that half the money, or \$211,934.34, was a gift to the marital estate, while the other half was a debt incurred by the marital estate, requiring repayment. Appellant argues that the entire amount was a gift to the marital estate, not a loan.

The standard of review for equitable distribution awards is set forth in *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985):

Historically our trial courts have been granted wide discretionary powers concerning domestic law cases. . . . It is well established that where matters are left to the discretion of the trial court, appellate review is limited to a determination of whether there was a clear abuse of discretion. . . . A trial

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court may be reversed for abuse of discretion only upon a showing that its actions are manifestly unsupported by reason. . . . A ruling committed to a trial court's discretion is to be accorded great deference and will be upset only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision.

Clearly, this is a difficult standard for appellant to meet, and he fails to meet it here.

The trial court did not abuse its discretion in concluding that the money was a loan. Testimony at trial showed that appellant induced appellee's father, as trustee, to advance the money for the house by promising to repay half the funds. Testimony also showed that appellant reaffirmed his promise to pay and his promise of his ability to repay on several subsequent occasions.

This Court has held that the "any competent evidence standard" applies in an equitable distribution action, meaning the testimony of one party may suffice to support the trial court's findings as to classification. *Taylor v. Taylor*, 92 N.C. App. 413, 418, 374 S.E.2d 644, 647 (1988). It is true that the appellant put on evidence tending to show that the funds were a gift. However, as long as some evidence supported the trial court's decision, our inquiry is satisfied. "The mere existence of conflicting evidence . . . [does] not justify reversal." *Taylor v. Taylor*, 92 N.C. App. 413, 418, 374 S.E.2d 644, 647 (1988). We thus uphold the trial court's classification.

We note the inapplicability of two recent cases that have been cited to support appellant's contentions. In *Kuder v. Schroeder*, 110 N.C. App. 355, 430 S.E.2d 271 (1993), an oral contract between spouses was invalidated. *Kuder* does not apply in the present case, which involves a loan between the couple and the wife's trust, not a promise between the husband and the wife.

Haywood v. Haywood, 333 N.C. 342, 425 S.E.2d 696 (1993), reversing 106 N.C. App. 91, 415 S.E.2d 565 (1992), is also inapplicable. That case dealt with the threshold determination of whether property purchased with separate funds was marital or separate property. Here, the parties have stipulated the property was marital.

Criteria for Dividing Marital Property

[3] Defendant-appellant's second contention is that the trial court improperly applied the criteria for dividing marital property set

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forth by N.C.G.S. § 50-20(c). These criteria include the parties' income, property and liabilities; the duration of the marriage and age and physical health of the parties; the need for the custodial parent to occupy the marital residence and use or own its household effects; the expectation of pension or other deferred compensation rights; contributions as a spouse, parent, wage earner or homemaker; contributions to education and career development efforts; the liquid or nonliquid character of marital property; the economic desirability of retaining professional assets intact; the tax consequences to each party; and parties' acts during the time of separation to maintain or devalue marital property. N.C.G.S. § 50-20(c)(1)-(12) (1987).¹

In order for this Court to overturn the trial court's judgment, appellant would have to show that it was "manifestly unsupported by reason" and "so arbitrary that it could not have been the result of a reasoned decision." *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985). Again, this is a difficult standard to meet, and appellant fails to meet it. The trial court is given broad discretion in evaluation and application of the § 50-20 factors. *Hartman v. Hartman*, 82 N.C. App. 167, 346 S.E.2d 196, *aff'd*, 319 N.C. 396, 354 S.E.2d 239 (1987); *Andrews v. Andrews*, 79 N.C. App. 228, 338 S.E.2d 809, *disc. rev. denied*, 316 N.C. 730, 345 S.E.2d 385 (1986).

Here, the trial court has sufficiently demonstrated the required "rational basis" for its distribution. *Nix v. Nix*, 80 N.C. App. 110, 341 S.E.2d 116 (1986). The court set forth numerous specific findings, based on evidence adduced at trial: (1) Appellant's 1991 salary, in his first full year of medical practice, was expected to be at least \$88,000. He has separate liabilities of some \$207,000. His liabilities as well as his present income and future earning potential, based on his past income, education, training, and skills, were factors to be considered in the distribution under N.C.G.S. § 50-20(c)(1); (2) Appellee is guaranteed a yearly income of \$20,000 from her trust. She is accustomed to, but has no right to demand, discretionary disbursements from her trust. From January 1, 1985 until July 30, 1990, she received \$371,458 in discretionary advances from the trust. The trust corpus, which exceeds \$7 million, does not vest in appellee until after the death of her father, and then in

1. Section 50-20(c) was modified by the North Carolina legislature, effective October 1, 1991. However, since this case was filed on March 27, 1991, the pre-amendment law applies.

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installments according to her age at the time. Her present income, future earnings potential, property interests, lack of employment history, and lack of skills were factors to be considered in the distribution under N.C.G.S. § 50-20(c)(1); (3) Appellee's need as the custodial parent to use the household effects of the marital residence was a factor to be considered under N.C.G.S. § 50-20(c)(4); (4) Appellee contributed separate funds to the reduction of appellant's student loans, which was a factor to be considered under N.C.G.S. § 50-20(c)(8); (5) The parties' assets were liquid, which was a factor to be considered under N.C.G.S. § 50-20(c)(9); (6) It was desirable to keep appellant's medical practice intact, which was a factor to be considered under N.C.G.S. § 50-20(c)(10); (7) Both parties made post-separation payments to maintain the marital residence, which was a factor to be considered under N.C.G.S. § 50-20(c)(11a); (8) Appellee's trust reduced the marital debt by \$4481.37, which is a factor to be considered under N.C.G.S. § 50-20(c)(11a); (9) The marital residence depreciated by \$24,000 in the nine months between the couple's separation and the home's sale, which is a factor to be considered under N.C.G.S. § 50-20(c)(11a) and/or (12); (10) Appellant used the marital residence for two months after the separation, which is a factor to be considered under N.C.G.S. § 50-20(c)(12); (11) After the separation, appellant converted \$1600 of marital assets and increased the marital debt by \$6000 with no evidence of use for marital purposes. This is a factor to be considered under N.C.G.S. § 50-20(c)(11a) and/or (12); and (12) During the marriage, appellee made gifts of at least \$432,600 of separate property to the marital estate, which is a factor to be considered under N.C.G.S. § 50-20(c)(12).

We conclude that, based on these and other findings, the distribution had a rational basis, and we thus uphold it.

Distribution of Personal Property

Appellant's third contention is that the trial court abused its discretion in distributing the parties' personal property because it failed to consider evidence favorable to him. Once again, in order to overturn the trial court's distribution, this Court would have to find that there was no evidence to support it. *Taylor v. Taylor*, 92 N.C. App. 413, 374 S.E.2d 644 (1988). We find there is evidence to support the distribution. The trial court determined the ownership of the parties' kitchen items, dishware, wedding gifts, and furniture, and found that each party made gifts to the other of

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separate personal property subsequent to the date of separation. There is sufficient evidence in the record to support these findings. Appellant himself admitted in his brief the existence of evidence supporting appellee's characterizations. He does not show that the trial court did not consider evidence favorable to him; he merely complains that the court was not persuaded by it. This does not constitute grounds to overturn the trial court.

Determination of Child Support

[4] The trial court found the reasonably necessary and actual expenses of the children to be \$1300 per child per month, totaling \$2600 per month. The court ordered appellant to pay half these expenses, or \$1300 per month, beginning in November of 1991.

Appellant claims that the court failed to consider the parties' incomes and wealth as required by N.C.G.S. § 50-13.4(c), and the "relative abilities of the parties to provide for payment of child support."

The appropriate level of child support is set forth in N.C.G.S. § 50-13.4:

Payments ordered for the support of a minor child shall be in such amount as to meet the reasonable needs of the child for health, education, and maintenance, having due regard to the estates, earnings, conditions, accustomed standard of living of the child and the parties, the child care and homemaker contributions of each party, and other facts of the particular case.

N.C.G.S. § 50-13.4(c) (1987 & Supp. 1992). The trial court has considerable discretion in determining the appropriate amount of prospective child support. "Absent a clear abuse of discretion, a judge's determination of what is a proper amount of support will not be disturbed on appeal." *Plott v. Plott*, 313 N.C. 63, 69, 326 S.E.2d 863, 868 (1985). A "judge is subject to reversal for abuse of discretion only upon a showing by a litigant that the challenged actions are manifestly unsupported by reason." *Id.*

We find that the trial court gave "due regard" to the parties' "estates, earnings [and] conditions." See *Cohen v. Cohen*, 100 N.C. App. 334, 340, 396 S.E.2d 344, 347 (1990), *disc. rev. denied*, 328 N.C. 270, 400 S.E.2d 451 (1991). It is apparent from the record that the trial court considered both the existence and structure

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of appellee's trust fund and appellant's income in making its determination. It concluded that a father in an established ophthalmologic practice, who had a 1991 income of at least \$88,000, is able to contribute half of his children's support. Where "there is a finding of ability to pay supported in the record by competent evidence, that finding will be conclusive." *Wyatt v. Wyatt*, 32 N.C. App. 162, 231 S.E.2d 42 (1977). We therefore uphold the trial court's child support determination.

Retroactive Child Support

[5] The trial court ordered appellant to pay retroactive child support in the amount of \$18,200. This figure represents half the cost of supporting the children, at \$1300 per month per child, during the fourteen months from the date of separation through the date of trial (September 1990 through October 1991). Appellant does not dispute the \$1300 per child per month figure. However, he contends the court abused its discretion in determining that he had the ability to pay during this time.

The court carefully considered, through numerous exhibits and extensive testimony, whether appellant was able to provide support during the relevant period, as required by *Savani v. Savani*, 102 N.C. App. 496, 403 S.E.2d 900 (1991). The court found that appellant paid appellee no direct child support throughout the time of the parties' separation. The court considered the money available to appellant, including income from his medical practice, loans, and withdrawals from various accounts, and his reasonable expenses. After examining the record, we hold that sufficient evidence exists to support the court's finding that the appellant was financially able to pay half of his children's support during the time of separation. We thus uphold the trial court's order for retroactive child support.

For the foregoing reasons, the decision of the trial court is

Affirmed.

Judges JOHNSON and JOHN concur.

IN RE APPEAL BY McCRARY

[112 N.C. App. 161 (1993)]

IN THE MATTER OF THE APPEAL BY SUE S. McCRARY FROM A
DECISION OF THE NORTH CAROLINA INSURANCE UNDERWRITING
ASSOCIATION AND THE NORTH CAROLINA COMMISSIONER OF
INSURANCE

No. 9210SC656

(Filed 5 October 1993)

**1. Administrative Law and Procedure § 65 (NCI4th)— review
of agency decision—standard of review—questions presented
determinative**

The standard of review which should be employed in reviewing an agency decision depends upon the nature of the alleged error: (1) if appellant argues the agency's decision was based on an error of law, then *de novo* review is required; (2) if appellant questions whether the agency's decision was supported by the evidence or was arbitrary or capricious, then the reviewing court must apply the whole record test; (3) but on a subsequent appeal to the Court of Appeals of the trial court's order affirming the agency's decision, the review is limited to a consideration of whether the court committed any error of law.

Am Jur 2d, Administrative Law § 730.

**2. Insurance § 911 (NCI4th)— insurance coverage voided ab
initio—material misrepresentations in application**

In voiding, *ab initio*, insurance coverage on petitioner's beach property, the Commissioner of Insurance did not err by failing to apply a "fraud" standard since (1) N.C.G.S. § 58-3-10 does not require a showing of fraud in order for an insurer to avoid a policy but instead requires a false and material misrepresentation; (2) the North Carolina Insurance Underwriting Association did not rely on the defense of fraud in seeking avoidance; and (3) the Commissioner did not utilize the defense of fraud in determining that the Association properly denied coverage.

Am Jur 2d, Insurance §§ 1007, 1013, 1014, 1068, 1069.

**3. Administrative Law and Procedure § 67 (NCI4th)— Insurance
Commissioner's denial of coverage—application of whole record
test by trial court**

The trial court was required to apply the whole record test in determining whether the Insurance Commissioner's deci-

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sion to deny coverage was contrary to the evidence presented, and if, after the record was reviewed, substantial evidence supported the agency's ruling, then the agency's ruling must stand.

Am Jur 2d, Administrative Law § 730.

- 4. Insurance § 911 (NCI4th)— order voiding insurance policy ab initio— whole record standard of review properly utilized and applied by trial court**

The trial court properly utilized and applied the whole record standard of review in affirming the Insurance Commissioner's order voiding, *ab initio*, a policy of insurance on petitioner's beach property where there was substantial evidence in the record that petitioner made a false statement that she resided at her beach house when in fact it was uninhabitable, and the misrepresentations were made in response to written questions on the insurance application.

Am Jur 2d, Insurance §§ 1007, 1013, 1014, 1068, 1069.

- 5. Insurance § 911 (NCI4th)— fire insurance—beach house— occupancy questions unanswered or incomplete— occupancy requirement not waived**

There was no merit to petitioner's contention that, even if answers to the vacancy and occupancy portions of her insurance application were unanswered or insufficiently answered, the Underwriting Association waived the right to full disclosure because it issued a policy of insurance on petitioner's beach house without further inquiry, since under procedures approved by the Commissioner of Insurance, a physical inspection was not required and the insurer could depend on forms submitted by its agent to determine if the property was insurable, and the Association, which never sent an agent to inspect the beach house, could not be chargeable with knowledge of the house's condition and thus did not waive any pertinent clauses.

Am Jur 2d, Insurance §§ 1007, 1013, 1014, 1068, 1069.

Appeal by petitioner from judgment entered 20 April 1992 by Judge Narley T. Cashwell in Wake County Superior Court. Heard in the Court of Appeals 3 June 1993.

IN RE APPEAL BY McCrARY

[112 N.C. App. 161 (1993)]

*Shipman & Lea, by Gary K. Shipman and Jennifer L. Umbaugh,
for petitioner-appellant.*

*Hunton & Williams, by Walton K. Joyner and Christopher
G. Browning, Jr., for appellee.*

JOHN, Judge.

Petitioner Sue S. McCrary contends the trial court erred by affirming an order of a Deputy Commissioner of Insurance (Commissioner) which voided, *ab initio*, insurance coverage on her property at Topsail Beach, North Carolina. We disagree.

On or about 24 September 1990, Donnie Hamm (Hamm), a licensed State Farm Insurance Agent, was assisting petitioner in obtaining insurance coverage for her beach house at Topsail Beach, North Carolina. Hamm and petitioner submitted an insurance application to the North Carolina Insurance Underwriting Association (Association), which was entitled "SUPPLEMENTAL APPLICATION—PRODUCER'S INSPECTION REPORT."

On this application form were questions addressing occupancy and vacancy of the property. These inquiries and petitioner's responses thereto were as follows:

4. OCCUPANCY (SHOW EACH TYPE OF OCCUPANT IN BUILDING) used as seasonal dwelling for single family

IF HABITATIONAL, SHOW NUMBER OF FAMILIES: 1

IF VACANT: ____ ATTACH VACANCY QUESTIONNAIRE

No "Vacancy Questionnaire" was ever attached to the application or sent to the Association.

At the time petitioner submitted the insurance application, the house had not been occupied for at least one year and nine months due to damage from arson on two previous occasions; no electricity or water served the house; the beds, interior panelling, and sheetrock were gone; and the ceilings had been removed. Although petitioner was conducting renovations to the property, it would not have been ready for occupancy until approximately May or June, 1991.

On 26 September 1990, the Association accepted petitioner's property as an insurable risk. The property was subsequently destroyed by fire on or about 30 October 1990.

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After the fire, petitioner filed a claim with the Association. On the basis of discrepancies between petitioner's representations and the actual condition of the house at the time the insurance application was submitted, the Association voided petitioner's insurance coverage *ab initio* for false and material representations. Petitioner appealed to the Commissioner of Insurance who upheld the Association's actions. Petitioner then appealed to the Superior Court which affirmed the Commissioner's decision.

I.

[1] Petitioner initially contends the standard of judicial review to be applied in reviewing the Commissioner's decision is "*de novo*" as opposed to the "whole record" test. Petitioner's argument is misdirected.

As a preliminary matter, since the present case concerns both (1) an appeal to the Superior Court of the Commissioner's order and (2) the subsequent appeal to this Court, we find it helpful to elaborate upon the pertinent review procedures applicable at each stage of the appeals process.

The Department of Insurance is a state agency and as such is subject to the Administrative Procedure Act (APA), N.C.G.S. §§ 150B-1 to -52 (1991). *N.C. Reinsurance Facility v. Long*, 98 N.C. App. 41, 44, 390 S.E.2d 176, 178 (1990). The APA provides:

Any person who is aggrieved by the final decision in a contested case, and who has exhausted all administrative remedies made available to him by statute or agency rule, is entitled to judicial review of the decision under this Article, unless adequate procedure for judicial review is provided by another statute, in which case the review shall be under such other statute.

G.S. § 150B-43. While N.C.G.S. § 58-2-75 (1991) also provides for judicial review of a decision of the Commissioner, this Court has determined G.S. § 150B-51 of the APA to be controlling. *Reinsurance Facility v. Long*, 98 N.C. App. at 46, 390 S.E.2d at 179. However, "[t]o the extent that G.S. § 58-2-75 adds to and is consistent with [the APA], we will proceed by applying the review standards articulated in both statutes." *Id.* at 46, 390 S.E.2d at 179.

The APA delineates the appropriate *scope* of judicial review of a final agency decision. A reviewing court may modify or reverse

IN RE APPEAL BY MCCRARY

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an agency's decision if the substantial rights of the petitioner may have been prejudiced because the agency's findings, inferences, conclusions, or decisions are:

- (4) Affected by . . . error of law;
- (5) Unsupported by substantial evidence . . . in view of the entire record as submitted; or
- (6) Arbitrary or capricious.

G.S. § 150B-51(b).

The proper *standard of review* under this statute depends upon the issues presented on appeal. *Walker v. N.C. Department of Human Resources*, 100 N.C. App. 498, 502, 397 S.E.2d 350, 354 (1990), *disc. review denied*, 328 N.C. 98, 402 S.E.2d 430 (1991). If appellant argues the agency's decision was based on an error of law, then "*de novo*" review is required. *Id.* at 502, 397 S.E.2d at 354. If, however, appellant questions (1) whether the agency's decision was supported by the evidence or (2) whether the decision was arbitrary or capricious, then the reviewing court must apply the "whole record" test. *Id.* A reviewing court *may even utilize more than one standard of review* if the nature of the issues raised so requires. See *Ellis v. N.C. Crime Victims Compensation Comm.*, 111 N.C. App. 157, 162, 432 S.E.2d 160, 164 (1993).

The aforementioned principles apply to the *initial appeal of the agency's decision*. A *subsequent appeal to this Court of a trial court's order affirming the agency's decision* presents a different question. Under G.S. § 150B-52, our review of a trial court's order is the same as in any other civil case—consideration of whether the court committed any error of law. *In re Kozy*, 91 N.C. App. 342, 344, 371 S.E.2d 778, 779-80 (1988), *disc. review denied*, 323 N.C. 704, 377 S.E.2d 225 (1989). Thus, since the questions initially addressed to the trial court are limited by G.S. § 150B-51(b), our task is to determine whether that court committed any error of law based upon a failure to apply properly the review standards set forth in G.S. § 150-51(b). *Sherrod v. N.C. Department of Human Resources*, 105 N.C. App. 526, 530, 414 S.E.2d 50, 53 (1992); *In re Kozy*, 91 N.C. App. at 344, 371 S.E.2d at 780. However, in instances where the trial court should have utilized *de novo* review, this Court will directly review the agency's decision under a *de novo* review standard. *Brooks v. Rebarco, Inc.*, 91 N.C. App. 459, 464, 372 S.E.2d 342, 345 (1988).

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[112 N.C. App. 161 (1993)]

Under the aforementioned principles, therefore, the task of this Court is twofold: (1) determine the appropriate standard of review and, when applicable, (2) determine whether the trial court properly applied this standard. *See Wiggins v. N.C. Department of Human Resources*, 105 N.C. App. 302, 306, 413 S.E.2d 3, 5 (1992).

II.

As previously discussed, the standard of review which should be employed in reviewing an agency decision depends upon the nature of the alleged error. *Walker v. N.C. Department of Human Resources*, 100 N.C. App. 498, 502, 397 S.E.2d 350, 354 (1990), *disc. review denied*, 328 N.C. 98, 402 S.E.2d 430 (1991). In the case *sub judice*, petitioner contends the Commissioner's decision to deny coverage was both (1) contrary to the law and (2) contrary to the evidence presented.

A.

[2] In arguing the Commissioner's decision was *contrary to law*, petitioner advances a single argument; she maintains the Commissioner did not properly interpret the term "fraudulent" as contained in N.C.G.S. § 58-3-10 (1991). Incorrect statutory interpretation by an agency constitutes an error of law and allows this Court to apply *de novo review*. *Brooks v. Rebarco, Inc.*, 91 N.C. App. 459, 464, 372 S.E.2d 342, 345 (1988). We are not persuaded by petitioner's contention.

G.S. § 58-3-10 provides:

All statements or descriptions in any application for a policy of insurance, or in the policy itself, shall be deemed representations and not warranties, and a representation, unless material or fraudulent, will not prevent a recovery on the policy.

Petitioner insists this statute requires a showing of fraud, *i.e.*, a false representation of a material fact, reasonably calculated and intentionally made to deceive, which does deceive, causing injury thereby. *Shreve v. Combs*, 54 N.C. App. 18, 21, 282 S.E.2d 568, 571 (1981). In other words, petitioner argues only a fraudulent misrepresentation can void a policy *ab initio*, and therefore the Commissioner erred in failing to consider whether her actions were "fraudulent" under the statute.

Petitioner's argument misses the mark. Under G.S. § 58-3-10, an insurer may avoid the policy if the insured makes a representa-

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tion which is both (1) *false* and (2) *material*; the misrepresentation *need not be fraudulent*. "If the representation is material and false, it is not necessary for avoidance of the policy that the misrepresentation be intentional." *Tedder v. Union Fidelity Life Ins. Co.*, 436 F.Supp. 847, 849 (E.D.N.C. 1977) (*construing* former N.C.G.S. § 58-30 which is identical to present G.S. § 58-3-10); *see also Cockerham v. Pilot Life Ins. Co.*, 92 N.C. App. 218, 220, 374 S.E.2d 174, 176 (1988).

A review of the record reveals the Association, in seeking avoidance of the policy, at all times relied upon the defense of *material* misrepresentation under G.S. § 58-3-10. Furthermore, while the Commissioner's order does not specifically cite the statute, it tracks the language of G.S. § 58-3-10 and concludes petitioner's application "contained a misrepresentation of material fact." While not necessary, we also note the superior court "examined . . . the [b]riefs and heard the arguments of counsel," yet made no reference to fraud in its order, thus suggesting this defense was neither advanced at the trial level nor relied upon by the trial court in affirming the Commissioner's decision. *See Cellu Products Co. v. G.T.E. Products Corp.*, 81 N.C. App. 474, 477-78, 344 S.E.2d 566, 568 (1986) (appellate court may only pass upon questions presented and ruled upon by lower courts). We thus conclude the Commissioner did not err by failing to apply a "fraud" standard since (1) G.S. § 58-3-10 does not require a showing of fraud in order for an insurer to avoid a policy; (2) the Association did not rely on the defense of fraud in seeking avoidance; and (3) the Commissioner did not utilize the defense of fraud in determining the Association properly denied coverage.

B.

[3] Petitioner also argues the Commissioner's decision to deny coverage was contrary to the evidence presented. Resolution of this issue must be decided by application of the "whole record" test. *Walker v. N.C. Department of Human Resources*, 100 N.C. App. 498, 502, 397 S.E.2d 350, 354 (1990).

The "whole record" test does not allow the reviewing court (here, the superior court) to substitute its judgment for the agency's as between two reasonably conflicting views, even though the court could justifiably have reached a different result had the matter been before it *de novo*. *Thompson v. Wake County Board of Education*, 292 N.C. 406, 410, 233 S.E.2d 538, 541 (1977). However, "it does require the court to take into account both the evidence justi-

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fying the agency's decision and the contradictory evidence from which a different result could be reached." *Lackey v. N.C. Department of Human Resources*, 306 N.C. 231, 238, 293 S.E.2d 171, 176 (1982). Pursuant to this standard, all the competent evidence is to be examined for a determination of whether the administrative agency's decision is supported by substantial evidence. *Rector v. N.C. Sheriffs' Education and Training Standards Commission*, 103 N.C. App. 527, 532, 406 S.E.2d 613, 616 (1991). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion and is more than a scintilla or a permissible inference." *Wiggins v. N.C. Department of Human Resources*, 105 N.C. App. 302, 306, 413 S.E.2d 3, 5 (1992). If, after all the record has been reviewed, substantial evidence supports the agency's ruling, then the agency's ruling must stand. *Community Savings & Loan Ass'n v. N.C. Savings & Loan Commission*, 43 N.C. App. 493, 497-98, 259 S.E.2d 373, 376 (1979).

With these principles in mind, we turn to the questions of whether the trial court (1) utilized and (2) properly applied the "whole record" standard of review. See *Sherrod v. N.C. Department of Human Resources*, 105 N.C. App. 526, 530, 414 S.E.2d 50, 53 (1992).

1.

[4] As a preliminary matter, we note plaintiff does not contend the trial court failed to apply "whole record" review; rather her sole argument regarding the applicable standard of review is that this Court should apply "*de novo*" review to all issues on appeal. Having previously rejected that argument, we also note the Superior Court's order enumerates it "examined the transcript and the record in this matter and . . . examined the Briefs and heard the arguments of counsel for Petitioner and Respondent," and specifies it "Finds as a Fact that the . . . Order of the Commissioner . . . is supported by substantial evidence" This indicates the Superior Court *utilized* the appropriate standard of review, and, there being no allegation to the contrary, we determine it did.

2.

We further conclude the Superior Court *properly applied* the "whole record" test in affirming the Commissioner's order. The Commissioner denied coverage on the basis of petitioner's misrepresentation of a material fact. Under N.C.G.S. § 58-3-10, an

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insurance policy may be avoided if the insured makes a representation which is both (1) *false* and (2) *material*. See discussion of *Tedder v. Union Fidelity*, *supra*.

There is substantial evidence of record to support the Commissioner's decision that petitioner made a *false* statement on her application of insurance. Petitioner's affirmation (on the insurance application) that the beach house was "used as seasonal dwelling for single family" can only be read, in conjunction with her leaving the "vacancy" question blank and failing to prepare and forward a "vacancy questionnaire," as a declaration the house was inhabited on a regular basis. Yet, by petitioner's own admission (during the hearing before the Commissioner), the house could not be inhabited in 1990, was unoccupied in 1989 and 1990, and was "completely without anybody in it since about 1985 or 1986." Nonetheless, Hamm testified that when assisting petitioner with the insurance application, he asked her, "[d]o you stay there?" and she responded "yes." At another point, Hamm testified he asked petitioner, "[d]o you stay down there?" and she replied "yes." Furthermore, there was no electricity or water serving the house; the beds, interior paneling, and sheetrock were gone; and the ceilings removed. A house physically incapable of being occupied cannot be "used as seasonal dwelling for single family" or be "habitational" for one family. Thus, substantial evidence supports the Commissioner's finding of *falsity*.

There is also substantial evidence of record to support the Commissioner's finding of a *material* false statement. The test for materiality is relatively simple. "[E]very fact untruly asserted or wrongfully suppressed must be regarded as material if the knowledge or ignorance of it would naturally influence the judgment of the insurer in making the contract, or in estimating the degree and character of the risk, or in fixing the rate of premium." *Wells v. Jefferson Standard Life Ins. Co.*, 211 N.C. 427, 429, 190 S.E. 744, 745 (1937). This test is a subjective one. *Goodwin v. Investors Life Ins. Co. of North America*, 332 N.C. 326, 332, 419 S.E.2d 766, 769 (1992). The determinative question is whether the insured's false answer would have influenced the insurance company in agreeing to accept the risk. *Id.* Furthermore, where misrepresentations are made in the form of written answers to written questions, the misrepresentations "are deemed to be material." *Tolbert v. Mutual Benefit Life Ins. Co.*, 236 N.C. 416, 419, 72 S.E.2d 915, 917 (1952).

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In the case *sub judice*, the misrepresentations were made in response to written questions on the insurance application, thereby satisfying the test for materiality under *Tolbert*. Testimony before the Commissioner further indicates the materiality of the statements. Corliss Battle, an underwriter, testified had the Association known the condition of the building it would never have agreed to insure the property. Donnie Hamm, petitioner's own insurance agent, also testified that extended periods of vacancy are critical matters to insurance companies in underwriting insurance. Applying the standards announced in both *Tolbert* and *Goodwin*, we conclude substantial evidence supported the Commissioner's finding of *materiality*.

Because (1) substantial evidence in the record supports the Commissioner's findings regarding material misrepresentations, and because (2) these findings in turn support the Commissioner's conclusion affirming the Association's denial of insurance coverage, we hold the trial court committed no error by affirming the Commissioner's decision.

III.

[5] Petitioner lastly argues even if the answers to the occupancy and vacancy portions of the application were unanswered or insufficiently answered, the Association has *waived* the right to full disclosure because it *issued* the policy without further inquiry. In addition, petitioner insists the Association was put on notice there were periods of time when the property would be vacant because she used the term "seasonal dwelling", and thus the Association *waived* any objections it had with respect to the condition of the property. However, these contentions are not properly before this Court, and we therefore decline to address them.

Appellate review is limited to consideration of those assignments of error set out in the record on appeal. N.C.R. App. P. 10(a); *Watson v. N.C. Real Estate Commission*, 87 N.C. App. 637, 639, 362 S.E.2d 294, 296 (1987), *disc. review denied*, 321 N.C. 746, 365 S.E.2d 296 (1988). No assignment of error raises the issue of waiver. Furthermore, upon examination of the record, we find nothing to indicate the question of waiver was raised in the trial court. "Appellate courts can only judicially know what appears of record . . . and we will not pass upon questions not presented and ruled upon by the [lower] court." *Cellu Products Co. v. G.T.E. Products Corp.*, 81 N.C. App. 474, 477-78, 344 S.E.2d 566, 568 (1986).

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Without expressly considering petitioner's waiver contention, we note an insurer waives a policy provision (which would have allowed avoidance of the policy) if at the time the policy is issued, the insurer has knowledge of existing conditions which would otherwise void the policy under the provision's terms. *Winston-Salem Fire Fighters Club, Inc. v. State Farm Fire & Casualty Co.*, 259 N.C. 582, 585, 131 S.E.2d 430, 432 (1963). Under procedures approved by the Commissioner of Insurance in 1985, a physical inspection of habitation insurance risks is not required; if the producer (here, the insured's agent) submits a properly completed Producer's Supplemental Application-Inspection Report, an insurer is permitted to use the form to determine if the property is insurable. In the case *sub judice*, the petitioner and her agent submitted a Supplemental Application regarding the property in question. Accordingly, since no agent of the Association ever visited petitioner's beach house, the Association cannot be chargeable with knowledge of the house's condition and thus did not waive any pertinent clauses. See *Firefighters Club*, 259 N.C. at 586, 131 S.E.2d at 433 (absent knowledge of vacancy, there can be no waiver of policy provisions relating to vacancy).

For the foregoing reasons, the judgment of the lower court is affirmed.

Affirmed.

Judges WELLS and COZORT concur.

STATE OF NORTH CAROLINA v. ALAN HOWARD PENDLETON

No. 9211SC880

(Filed 5 October 1993)

Constitutional Law § 121 (NCI4th)— Campbell University employees—commissioning as policemen—enabling statute not unconstitutional

N.C.G.S. Chapter 74A authorizing the Attorney General to commission as policemen the employees of certain public and private institutions or companies does not violate the Establishment Clause of the First Amendment because it per-

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mits employees of a religious institution, Campbell University, to be commissioned as policemen and thereby exercise the authority of the State, since Chapter 74A has a secular legislative purpose; its primary effect is neither to advance nor to inhibit religion; it does not foster an excessive entanglement with religion; and it is not an unconstitutional delegation of the State's law enforcement authority. Therefore, defendant's arrest for DWI by a Campbell University police officer was not unconstitutional. N.C.G.S. § 74A-1.

Am Jur 2d, Constitutional Law §§ 466-470, 477.

Appeal by the State from order entered 29 April 1992 by Judge Steve Allen in Harnett County Superior Court. Heard in the Court of Appeals 14 June 1993.

The following facts pertinent to this appeal are not disputed by the parties. Campbell University, located in Buies Creek, North Carolina, is affiliated with the Baptist State Convention of North Carolina. Campbell University operates a police force consisting of a captain and eight full-time officers. Campbell University's police officers were commissioned as police officers by the Attorney General under the provisions of the North Carolina General Statutes, Chapter 74A. Chapter 74A authorizes the Attorney General to commission as policemen the employees of certain public and private institutions or companies.

At the times relevant to this appeal, Ricky Symmonds was employed as a deputy sheriff by the Harnett County Sheriff's Department. While so employed, Symmonds also acted as the chief of Campbell University's police force. Reed Jones was employed as a police officer by the University. Defendant, Alan Howard Pendleton, was an undergraduate student at the University and resided in a campus dormitory.

On 12 April 1991, at 1:05 a.m., Officer Jones observed defendant operating an automobile on a public highway near the University. Jones followed defendant as defendant traveled toward the University campus. Defendant crossed the center line of the roadway several times and weaved back and forth within his lane of travel. Jones stopped defendant and arrested him for driving while impaired. On 26 June 1991, defendant was convicted in the Harnett County District Court of driving while impaired. He appealed to the Superior Court.

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On 3 September 1991, defendant filed in the Superior Court a motion to dismiss his conviction on the ground that Chapter 74A violates the First Amendment of the Constitution of the United States, and Article I, Sections 13 and 19 of the North Carolina Constitution. Specifically, defendant alleged that Chapter 74A is unconstitutional because it permits employees of a religious institution to be commissioned as policemen and thereby exercise the authority of the State. Defendant further alleged that by granting police powers to a private, church-owned university, Chapter 74A "enables state authority to intervene in the church agency and visa [sic] versa, thus violating the separation of church and state."

On 29 April 1992, the trial court entered an order dismissing defendant's conviction, concluding that Chapter 74A is unconstitutional on the grounds that it creates an excessive entanglement of the State and the church, and it "constitutes an impermissible delegation of authority to a religious institution as it is an establishment of religion." The trial court further concluded that defendant's arrest was unconstitutional in that it was affected by an unconstitutional exercise of the State's police power. Based on these conclusions, the trial court allowed defendant's motion to dismiss his conviction. The State appealed.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Valerie B. Spalding, for the State.

Stewart and Hayes, P.A., by Gerald W. Hayes, Jr., and Lytch, Tart and Fusco, P.A., by Phillip A. Fusco, for defendant-appellee.

Robert A. Buzzard for Campbell University, amicus curiae.

MARTIN, Judge.

This case brings into question the validity of Chapter 74A under both the State and Federal Constitutions. For the reasons set forth herein, we find that Chapter 74A is constitutional, both on its face and as applied to defendant.

Article I, Section 13 of the North Carolina Constitution guarantees to all persons the right to worship according to the dictates of their own consciences and that the State shall not, in any case whatever, control or interfere with the rights of conscience. Article I, Section 19 of the North Carolina Constitution prohibits discrimination by the State against any person because of that person's religion. The First Amendment to the Constitution

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of the United States provides that "Congress shall make no law respecting an establishment of religion"

These constitutional provisions are said to guarantee "freedom of religious profession and worship, 'as well as an equally firmly established separation of church and state.'" *Church v. State*, 299 N.C. 399, 406, 263 S.E.2d 726, 730 (1980), *quoting Braswell v. Purser*, 282 N.C. 388, 393, 193 S.E.2d 90, 93 (1972). A legislative enactment violates these constitutional provisions if such enactment, "whether in purpose, substantive effect, or administrative procedure, tends to control or interfere with religious affairs, or discriminate along religious lines, or to constitute a law respecting the establishment of religion." *Church*, 299 N.C. at 406, 263 S.E.2d at 730. What these constitutional mandates demand is secular neutrality toward religion. *Id.*

Although our analysis of the constitutionality of Chapter 74A will focus primarily on the United States Supreme Court's interpretations of the Establishment Clause, our decision is nonetheless grounded on the requirements of the North Carolina Constitution. As our Supreme Court has said, "although the differences in terminology in the relevant North Carolina and federal constitutional provisions, may support in some cases differences in scope of their application, . . . the neutrality demanded by the First Amendment is also compelled by the conjunction of Sections 13 and 19 of Article I." *Church*, 299 N.C. at 406, n.1, 263 S.E.2d at 730, n.1.

The United States Supreme Court, in interpreting the Establishment Clause of the United States Constitution, has developed a three-pronged analytical scheme for determining the facial constitutionality of legislative enactments under the Establishment Clause. *Lemon v. Kurtzman*, 403 U.S. 602, 29 L.Ed.2d 745 (1971). This analytical scheme, known as the *Lemon* test, is stated as follows:

First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . . finally, the statute must not foster 'an excessive government entanglement with religion.' (Citations omitted.)

Id. at 612-13, 29 L.Ed.2d at 755.

We now apply the *Lemon* test to determine whether Chapter 74A is constitutional on its face. G.S. § 74A-1 provides in pertinent part:

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Any educational institution or hospital, whether State or private, or any other State institution, public utility company, construction company, manufacturing company, auction company, incorporated security patrols or corporations engaged in providing security or protection services for persons or property, may apply to the Attorney General to commission such persons as the institution, corporation or company may designate to act as policemen for it. The Attorney General upon such application may appoint such persons or so many of them as he may deem proper to be such policemen, and shall issue to the persons so appointed a commission to act as such policemen. Nothing contained in the provisions of this section shall have the effect to relieve any such company or corporation from any civil liability for acts of such policemen, in exercising or attempting to exercise the powers conferred by this Chapter.

G.S. § 74A-2 provides that policemen commissioned under the Chapter shall possess all the powers of municipal and county police to make arrests for felonies and misdemeanors and to charge for infractions on property owned or controlled by their employers. N.C. Gen. Stat. § 74A-2(b). The authority of policemen who are employed by any college or university extends to the public roads passing through or immediately adjoining the property of the employer. N.C. Gen. Stat. § 74A-2(e)(1). In addition, the authority of such college or university policemen may be extended by agreement between the employer institution's board of trustees and the governing board of the municipality or county in which the institution is located. N.C. Gen. Stat. § 74A-2(e)(2) and (3).

Under the *Lemon* test, we must first determine whether the Chapter has a secular legislative purpose. Our review of Chapter 74A reveals nothing that evinces an intent to aid, promote, restrict, hinder, or otherwise affect any religion or any religious organization. Likewise, the Chapter is devoid of any provision which could be deemed to manifest a preference for one religion over any other religion. The ability of an institution or company to have its employees commissioned as policemen is not dependent upon its status as a secular or sectarian institution. Clearly, Chapter 74A reveals a valid secular purpose; that of extending to institutions, companies, hospitals and the like, both private and public, the police power of the State for the purpose of protecting persons and prop-

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erty located on their premises. Thus, we conclude that Chapter 74A has a secular legislative purpose.

Second, we must determine whether the Chapter's *primary* effect is to advance or inhibit religion. The Establishment Clause is violated if a State enacts laws which "aid one religion, aid all religions, or prefer one religion over another." However, legislation which provides some incidental or remote advantage to a religious organization does not run afoul of the Establishment Clause. *Bowen v. Kendrick*, 487 U.S. 589, 101 L.Ed.2d 520 (1988); *Mueller v. Allen*, 463 U.S. 388, 77 L.Ed.2d 721 (1983). Where the class benefitted by the legislative enactment is large, the more likely it will be that "the advantages to religious institutions will indeed be incidental to secular ends and effects." *Public Funds for Public Schools of N.J. v. Byrne*, 590 F.2d 514, 518 (3d Cir. 1979). Defendant argues that the effect of the Chapter, as applied in this case, is to advance the religious principles of Campbell University. We disagree.

Defendant bases his contention on evidence that the University prohibits the consumption of alcoholic beverages on University property and that its rules also restrict opposite sex visitation in the University's campus dormitories. Officer Jones testified that he does not enforce University regulations, rather he reports such violations to the University's dean. In addition, Officer Jones testified that if he was notified that alcoholic beverages were being consumed in a campus dormitory, he would record the names of the persons involved and hold the alcoholic beverages for University authorities. These actions would be taken even if the individuals involved were not violating the law of this State.

Defendant contends that when Campbell policemen enforce the University's rules of conduct, they are exercising the authority granted to them by the State under Chapter 74A, thereby creating the appearance of state endorsement of the University's religious beliefs and practices. This apparent state endorsement, argues defendant, confers a benefit on the University in violation of the Establishment Clause. We disagree.

As previously noted, Chapter 74A makes no distinction between religious and secular institutions. The Chapter applies to hospitals and educational institutions, whether state or private, public utilities, construction companies, manufacturing companies, auction companies and private security corporations. We believe

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that the Chapter's breadth of application is a strong indication that its primary effects are secular. *Public Funds for Public Schools of N.J. v. Byrne*, 590 F.2d 514.

In addition, the *primary* benefits which flow from a grant of authority under Chapter 74A are strictly secular in nature. Public and private organizations are benefitted by having increased authority to protect persons and property located on their premises and the State is benefitted by the increased law enforcement which is provided without expense to the State. The State certainly has an interest in the enforcement of its laws and the protection of its citizens and their property.

Assuming *arguendo* that Chapter 74A somehow aids Campbell University in its alleged efforts to promote certain religious practices and beliefs, the aid received is clearly indirect, insubstantial, and incidental. We find nothing in Chapter 74A which indicates anything other than an intent to pursue a course of complete neutrality toward religion. *Wallace v. Jaffree*, 472 U.S. 38, 86 L.Ed.2d 29 (1985). That Campbell University may incidentally benefit by having its employees commissioned under Chapter 74A, does not render the Chapter unconstitutional.

There is nothing in the First Amendment which prevents religious institutions from participating in benefits which are equally available to secular institutions. *Bowen v. Kendrick*, 487 U.S. 589, 101 L.Ed.2d 520 (1988); *Bradfield v. Roberts*, 175 U.S. 291, 44 L.Ed. 168 (1899). To differentiate between those institutions which are religiously affiliated and those which are not so affiliated would be to favor the secular over the religious. Article I, Section 19 of the North Carolina Constitution forbids "discrimination by the State because of . . . religion . . ." For the foregoing reasons, we hold that the *primary* effect of Chapter 74A is neither to advance nor inhibit religion.

Finally, we must determine whether Chapter 74A fosters an excessive entanglement between the State and religion. "Excessive entanglement" cases typically arise when the government authorizes financial grants to a program whose participants include institutions which are religiously affiliated. *Bowen*, 487 U.S. at 616, 101 L.Ed.2d at 545. Financial grants will be found to foster "excessive entanglement" if they necessitate government oversight of the religious institution's affairs in order to insure that the aid flowing

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to the institution is utilized for secular purposes and not for the advancement of religion. *Id.* at 615, 101 L.Ed.2d at 544.

This case simply does not involve a flow of taxpayer monies to a religious institution and therefore does not present the need for government oversight which would create the possibility of "excessive entanglement." The "aid" provided to Campbell University by Chapter 74A, the delegation of law enforcement authority, is distinctly different in nature from the provision of financial aid to a religiously affiliated institution. Whereas financial aid may be utilized in a manner which would violate the Establishment Clause, the exercise of law enforcement authority is strictly a secular function.

Moreover, there is nothing in Chapter 74A which would otherwise indicate a need for government supervision of Campbell University or its police officers. If Chapter 74A can be said to create some interrelationship between the State and the University, it certainly does not amount to an intrusion by the State into the University's internal affairs. *See Aguilar v. Felton*, 473 U.S. 402, 409-10, 87 L.Ed.2d 290, 297-98 (1985).

Defendant contends that there is an "excessive entanglement" in this case because Campbell police officers are employed to perform two roles for the University. One role performed by Campbell policemen is enforcement of the laws of the State. The other role, according to defendant, is enforcement of the student code of conduct. Defendant argues that allowing Campbell police officers to enforce the student code of conduct while cloaked with the authority of the State fosters "excessive entanglement." We disagree.

"Excessive entanglement" is the phrase which has been used to describe government involvement in the affairs of the church and, vice versa. A legislative enactment is said to foster an "excessive entanglement" between church and state when the enactment necessitates "sustained and detailed administrative relationships" between the church and state. *Walz v. Tax Commission*, 397 U.S. 664, 675, 25 L.Ed.2d 697, 705 (1970).

In this case, policemen commissioned under Chapter 74A are not employees of the State and there is nothing in the Chapter which requires or necessitates that they be supervised by the State. Rather, the supervision of the policemen is the responsibility of their employers and their employers remain civilly liable for acts

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committed by the policemen in the exercise or attempted exercise of their authority. N.C. Gen. Stat. § 74A-1. Simply stated, Chapter 74A does not by its terms require, or by its effects necessitate, government involvement in the affairs of the University. Thus, even if the nature of an officer's employment by Campbell University is twofold, the State has no involvement in the University's affairs which could be deemed to constitute an "excessive entanglement."

Defendant also contends that there is an "excessive entanglement" between the State and Campbell University because Ricky Symmonds, who is employed and paid by the Harnett County Sheriff's Department, acts as the chief of the Campbell University police force. We disagree.

G.S. § 74A-4 specifically provides that the compensation of policemen commissioned under the Chapter shall be paid by their employers. Adherence to the dictates of the Chapter insures that university and college police are independent from state and local government. While the agreement between Campbell University and Harnett County regarding Deputy Symmonds' compensation may be in violation of G.S. § 74A-4, the question of the legality of that agreement is not before us and it has no bearing on our inquiry regarding the constitutionality of Chapter 74A. For the reasons set forth above, we hold that Chapter 74A does not create an excessive entanglement between church and state.

In the alternative, defendant argues that the delegation of a governmental function to Campbell University is itself violative of the Establishment Clause. In support of this contention, defendant cites *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 74 L.Ed.2d 297 (1982). *Larkin* involved a Massachusetts statute which vested "in the governing bodies of churches and schools the power to effectively veto applications for liquor licenses within a five hundred foot radius of the church or school[.]" *Larkin*, 459 U.S. at 117, 74 L.Ed.2d at 301. The *Larkin* court found that the statute at issue was violative of the Establishment Clause. The facts of *Larkin*, however, are distinguishable from the facts in this case.

In *Larkin*, the institutions that were vested with governmental powers were churches. Although Campbell University is church affiliated, it is a university, not a church. Moreover, Chapter 74A grants law enforcement authority to individuals employed by cer-

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tain institutions; the Chapter does not grant law enforcement authority to the institution itself.

Under the statute in *Larkin*, the churches' power to restrict the issuance of liquor licenses was standardless. *Id.* at 125, 74 L.Ed.2d at 306. In rendering their decisions, the churches were not required to state the reasons for their decisions, or even to make any findings in support thereof. *Id.* Their power was absolute and was no substitute for the reasoned decision making of a body guided by legal standards. *Id.* at 127, 74 L.Ed.2d at 307.

Contrary to the authority of the churches in *Larkin*, the authority of officers commissioned under Chapter 74A is guided by the law of this State to the same extent and degree as all other municipal and county police. In addition, the authority delegated to the churches in *Larkin* was the authority to make legislative or adjudicatory decisions. The authority delegated under Chapter 74A involves no decision making authority. Based on the foregoing factual differences between this case and *Larkin*, we hold that the Chapter's delegation of law enforcement authority does not violate the Establishment Clause.

In summary, we hold that Chapter 74A has a secular legislative purpose, its primary effect is neither to advance nor to inhibit religion, it does not foster an excessive entanglement with religion and it is not an unconstitutional delegation of the State's law enforcement authority. For the reasons set forth herein, the order of the trial court dismissing defendant's conviction is reversed.

Reversed.

Judges ARNOLD and COZORT concur.

MARLOWE v. CLARK

[112 N.C. App. 181 (1993)]

CATHERINE W. MARLOWE, PLAINTIFF v. BILLY GOODMAN CLARK AND WIFE,
SHIRLEY CLARK, DEFENDANTS

No. 9215SC929

(Filed 5 October 1993)

1. Estates § 61 (NCI4th) — actions between heirs — alleged tenants in common — evidence not sufficient

The trial court did not err by granting summary judgment for defendant on the issue of cotenancy where plaintiff and defendant were children of Mae Goodman White, but had different fathers; the land in question constituted part of a tract acquired separately by plaintiff's father, W. R. White, Sr.; W. R. White, Sr. died intestate in 1960, survived by his wife and two children; under the law at that time, Mae Goodman White was entitled to a one-third dower interest, but it was never laid off; Mae Goodman White conveyed the tract in question to defendant in 1976; and Mae Goodman White died testate in 1981, leaving all of her property to her children. Although plaintiff alleged that she and defendant were heirs of W.R. White, Sr. and that they held the disputed tract as tenants in common, the only possible way in which plaintiff and defendant could have held this tract as tenants in common would have been if both were the children of W.R. White, Sr. and there is absolutely no evidence in the record to indicate such kinship. The mere assertion of a cotenancy relationship in plaintiff's complaint was not sufficient to defeat summary judgment when defendant offered evidence to the contrary.

Am Jur 2d, Cotenancy and Joint Ownership § 27 et seq.**2. Adverse Possession § 2 (NCI4th) — adverse possession — element of hostility — knowledge by owner of owner's interest in property**

The elements of adverse possession, including hostility, were met where defendant was given a deed to the disputed tract by his mother; the deed contained an adequate description of the tract, so that defendant had color of title and the period of possession was only seven years; defendant and his wife have lived continuously on the tract and have paid all applicable taxes from 1977 until the present; the only elements of adverse possession actually disputed were hostile

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possession and time of possession; although plaintiff asserts that there cannot be hostile possession unless the true owner of the property is aware that he or she has an interest in the property, she was unable to offer any North Carolina authority to support her position; and it is clear that defendant's occupation and possession has been exclusive and without any recognition of plaintiff's rights.

Am Jur 2d, Adverse Possession § 8 et seq.**3. Adverse Possession § 27 (NCI4th)— running of statutory period—dower interest—assertion of title**

Defendant continuously held the disputed tract for the statutory period to acquire the property by adverse possession under color of title where defendant acquired the property by deed from his mother in 1976; defendant and his wife recorded a deed of trust on the property, built a home, lived continuously on the property from 1977 to the present, and paid all applicable taxes; defendant's mother had acquired the property through her husband, who had died intestate in 1960, before the Intestate Succession Act; defendant's mother was entitled to a dower interest in the property, but it was never laid off; defendant's mother died in 1981, leaving all of her property to her children; plaintiff filed a petition for partition in 1987; defendant filed a counterclaim alleging that he and his wife owned the disputed tract in fee simple, even though that tract was not part of the partition petition; defendant voluntarily dismissed his counterclaim in 1990; and plaintiff filed the present action about one year later, ten years after plaintiff's and defendant's mother had died. Although defendant asserts that the statutory period of possession began in 1976 when his mother conveyed the tract to him, there is nothing more than defendant's unsubstantiated assertion that his mother's dower interest was never asserted. Taking the facts in the light most favorable to the nonmovant, plaintiff, defendant's mother properly claimed her dower interest, defendant could not adversely hold the tract against plaintiff until their mother died in 1981, defendant's possession was continuous and uninterrupted since 1981, and with nothing else appearing defendant's title would have ripened in September 1988, seven years after his mother's death. Although plaintiff attempts to toll the running of the statutory period by alleging that the issue of ownership was raised within the seven years in defendant's counterclaim

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to the partition, it is implicit in N.C.G.S. § 1A-1, Rule 41(a) that only the party who took the voluntary dismissal may refile within the prescribed time.

Am Jur 2d, Adverse Possession § 15.

Appeal by plaintiff from order entered 27 April 1992 by Judge F. Gordon Battle in Chatham County Superior Court. Heard in the Court of Appeals 8 September 1993.

Levine, Stewart & Davis, by John T. Stewart and Donna Davis, for plaintiff-appellant.

Law Firm of Wade Barber, by Wade Barber and Page Vernon, for defendants-appellees.

LEWIS, Judge.

The issue here is the ownership of a three acre tract of land in Chatham County. The plaintiff in this action is the half-sister of the defendant, Billy Clark, both being children of Mae Goodman White, but having different fathers. Catherine W. Marlowe ("plaintiff") asserts an interest in the disputed property as an heir of W.R. White, Sr., whereas Billy Goodman Clark ("defendant") claims title to the property by virtue of adverse possession. We hold that defendant has the superior claim of title and affirm the trial court's entry of summary judgment.

On 14 February 1944, a fifty acre tract of land was conveyed to W.R. White, Sr. and Mae Goodman White as tenants by the entirety (hereafter "Entirety Property"). Upon Mr. White's death, Mrs. White owned this tract in fee simple. On 5 May 1947 Mr. White acquired an adjacent but separate 15.3 acre tract of land (hereafter "the County Home Tract"). On 5 March 1960, Mr. White died intestate survived by his widow, Mae Goodman White, and his two children; William Robert White, Jr. and plaintiff. Under the law existing at the time of Mr. White's death, Mae Goodman White was entitled to a dower interest of one-third the value of the real property held during coverture, but according to defendant this dower interest was never laid off.

In an attempt to provide a home for defendant and his wife, Mae Goodman White conveyed a three acre tract of land (hereafter "the Three Acre Tract") to defendant on 19 May 1976. The Three Acre Tract included a portion of the Entirety Property as well

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as a portion of the County Home Tract. After the property was conveyed to them, defendant and his wife recorded a deed of trust on the Three Acre Tract and began building a home. From 1977 until the present, defendant and his wife have lived continuously on the Three Acre Tract and have paid all applicable taxes.

In September 1981 Mae Goodman White died testate leaving all of her property to her children in the following proportions: two-fifths to plaintiff, one-fifth to defendant and two-fifths to W.R. White, Jr. Plaintiff's brother, W.R. White, Jr., has elected not to pursue the present action and for all intents and purposes has conveyed his interest to plaintiff. In January 1987, in an attempt to close her mother's estate, plaintiff filed a petition to partition 53.4 acres of Mae Goodman White's estate on behalf of herself and her brother. The petition property included portions of the Entirety Property and the County Home Tract, but the petition did not include the Three Acre Tract upon which defendant and his wife were residing. Shortly after the petition was filed, defendant filed a "counterclaim" to the petition asserting that he and his wife were the fee simple owners of the Three Acre Tract. Although defendant eventually voluntarily dismissed his "counterclaim" on 17 October 1990, he unsuccessfully attempted to establish his fee simple title to the Three Acre Tract by asking plaintiff to sign a quitclaim deed.

On 31 October 1991, plaintiff initiated the current action. In her complaint, plaintiff asserted an interest in the County Home Tract as an heir of W.R. White, Sr. and Mae Goodman White. After an amendment and a motion for more definite statement, it became clear that plaintiff was actually asserting an interest in the Three Acre Tract as an heir of W.R. White, Sr.

This matter came before the Honorable F. Gordon Battle on 27 April 1992 on defendant's motion for summary judgment. Judge Battle granted defendant's motion and plaintiff has appealed.

At the outset we note that there is no dispute as to that portion of the Three Acre Tract overlapping the Entirety Property. Mae Goodman White as sole owner of the Entirety Property was free to dispose of the property as she saw fit. Plaintiff conceded this point at oral argument. Thus, the only property in dispute is that portion of the Three Acre Tract which overlaps the County Home Tract.

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[1] In her first argument, plaintiff alleges that the trial court erred in failing to find that plaintiff and defendant held the Three Acre Tract as tenants in common. In her complaint plaintiff alleged that she and defendant were both heirs of W.R. White, Sr. and that they held the Three Acre Tract as tenants in common. Therefore, it was impossible for defendant to have adversely possessed the property against her as there had been no ouster. In support of her position, plaintiff relies on *McCann v. Travis*, 63 N.C. App. 447, 305 S.E.2d 197 (1983).

We find there is no cotenancy. The only possible way which plaintiff and defendant could have held the Three Acre Tract as tenants in common would have been if both were the children of W.R. White, Sr. However, there is absolutely no evidence in the record to indicate such kinship. Whenever plaintiff was asked what her relationship was with defendant, she would emphatically respond: "He's not my daddy's son," or something similar. In her brief, plaintiff has made a reference inferring that defendant was adopted, but she has failed to cite any portion of the record supporting this assertion. In fact, after an extensive review of the record we have found no evidence that plaintiff and defendant were related by the whole blood or that defendant was adopted. We find it incredible that counsel for the plaintiff could argue that the mere assertion of a cotenancy relationship in her complaint was sufficient to defeat summary judgment when defendant had offered evidence to the contrary. See *Wachovia Bank & Trust Co. v. Grose*, 64 N.C. App. 289, 292, 307 S.E.2d 216, 217-18 (1983), *disc. rev. denied*, 311 N.C. 309, 317 S.E.2d 908 (1984) ("When the party moving for summary judgment presents an adequately supported motion, the opposing party must come forward with facts, not mere allegations, which controvert the facts set forth in the moving party's case, or otherwise suffer a summary judgment"). We find counsel's argument that plaintiff and defendant were cotenants in the Three Acre Tract frivolous and devoid of any merit.

[2] In the event that we should disagree with her as to the existence of a cotenancy relationship, plaintiff argues that the elements of adverse possession have not been met, particularly the element of hostility. Although we disagree with plaintiff's argument, we find this a reasonable position.

Adverse possession may be defined as the "actual, open, notorious, exclusive, continuous and hostile occupation and posses-

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sion of the land of another under claim of right or color of title for the entire period required by the statute." *Federal Paper Bd. Co. v. Hartsfield*, 87 N.C. App. 667, 671, 362 S.E.2d 169, 171 (1987) (citation omitted). If possession is under color of title then the statutory period of possession is seven years. N.C.G.S. § 1-38 (1983). Otherwise possession for 20 years is necessary to acquire title by adverse possession. N.C.G.S. § 1-40. Adverse possession under color of title has been defined as "occupancy under a writing that purports to pass title to the occupant but which does not actually do so either because the person executing the writing fails to have title or capacity to transfer the title or because of the defective mode of the conveyance used." *Cobb v. Spurlin*, 73 N.C. App. 560, 564, 327 S.E.2d 244, 247 (1985). It is well established that a deed may constitute color of title. *Taylor v. Brittain*, 76 N.C. App. 574, 334 S.E.2d 242 (1985), *modified and aff'd*, 317 N.C. 146, 343 S.E.2d 536 (1986). The only requirement is that the deed contain an adequate description of the land. *McDaris v. Breit Bar "T" Corp.*, 265 N.C. 298, 144 S.E.2d 59 (1965).

In this matter, defendant was given a deed to the Three Acre Tract by Mae Goodman White. Since the deed contained an adequate description of the Three Acre Tract, we hold that defendant has color of title. With color of title, the period of possession is only seven years. The only elements of adverse possession which are actually disputed are hostile possession and the time of possession. It is clear that defendant has met the remaining elements.

Plaintiff asserts that there cannot be hostile possession unless the true owner of the property is aware that he has an interest in the property. In this case plaintiff claims that she was not aware of her interest until 1987, and that she filed her action asserting that interest well before the seven year period expired. Although plaintiff's view of hostile possession is innovative, she has been unable to offer any North Carolina authority to support her position. In *State v. Brooks*, 275 N.C. 175, 166 S.E.2d 70 (1969), our Supreme Court stated that hostile possession does not mean ill will or animosity, but only that one claims an exclusive right to the property. Also, *Webster's* describes hostile possession as that possession which excludes any recognition of the true owner's rights. *Webster's Real Property Law in North Carolina* § 289 (1988). It is clear that defendant's occupation and possession has been exclusive and without any recognition as to plaintiff's rights.

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Until recently, North Carolina followed the minority position that an individual had to have an intent to claim against the true owner. This was altered by the Supreme Court's holding in *Walls v. Grohman*, 315 N.C. 239, 337 S.E.2d 556 (1985), wherein the Court stated that:

[w]hen a landowner, acting under a mistake as to the true boundary between his property and that of another, takes possession of the land believing it to be his own and claims title thereto, his possession and claim of title is adverse. If such adverse possession meets all other requirements and continues for the requisite statutory period, the claimant acquires title by adverse possession even though the claim of title is founded on a mistake.

Id. at 249, 337 S.E.2d at 562. There is nothing in this statement, or in any other, suggesting that the true owner must know of his interest in land before possession can be considered hostile or adverse to the true owner. In fact, such a requirement would run counter to the basis of adverse possession. *See Webster's* § 286 ("If persons who own land do not attend it and leave it fallow, and make no attempt to watch after it and use it, it is deemed better for the community and society in general for the title to be shifted after a specified period of time to those who undertake to use it and make it productive.") The ownership of property at issue here was readily ascertainable from the public records in the courthouse. Plaintiff or counsel had only to look. We find no merit to plaintiff's claim that defendant's possession was not hostile.

[3] We now turn to the more difficult issue of whether or not defendant has continuously held the Three Acre Tract for the statutory period. A proper resolution of this matter is made difficult because W.R. White, Sr. died intestate and prior to the enactment of the Intestate Succession Act. Under the law as it existed at the time of Mr. White's death, Mae Goodman White was entitled to a dower interest of one-third the value of all the real property of which her husband was seized during coverture. *See N.C.G.S. § 30-5 (1950) repealed by N.C.G.S. 29-4 (1959) (effective 1 July 1960).* Plaintiff claims that Mae Goodman White held the Three Acre Tract as part of her dower interest, making it impossible for her to convey a fee simple to defendant. According to plaintiff she holds the remainder of her mother's dower interest, preventing

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the running of the statutory period until the date of Mae Goodman White's death in 1981. In support of this argument, plaintiff relies on the "well established rule that possession of real property cannot be adverse to remaindermen until the death of the life tenant, even though during the lifetime of the life tenant he gave a deed purporting to convey a fee." *Cassada v. Cassada*, 103 N.C. App. 129, 136, 404 S.E.2d 491, 495, *cert. denied*, 329 N.C. 786, 408 S.E.2d 516 (1991) (citations omitted).

In contrast, defendant asserts that the statutory period of possession began in 1976 when Mae Goodman White conveyed the Three Acre Tract to him. As support for his position, defendant cites *Graves v. Causey*, 170 N.C. 175, 86 S.E. 1030 (1915), where the Supreme Court held that one who enters land under a deed from a widow, whose dower had not been allotted, may hold adversely against the heirs. Although *Graves* appears to be on point, we decline to follow it because we have nothing more than defendant's unsubstantiated assertion that Mae Goodman White's dower interest was never allotted. In order to assert her dower interest, Mae Goodman White had to either agree with the other heirs as to what property she would hold, or she had to petition the superior court to lay it off. N.C.G.S. §§ 30-11 and 30-12 (1950) (repealed). From the record before us, we cannot determine which if either course Mrs. White chose.

In reviewing a motion for summary judgment, the issue on appeal is whether or not there is a genuine issue of material fact so as to entitle the movant to judgment as a matter of law. *Smith v. Smith*, 65 N.C. App. 139, 308 S.E.2d 504 (1983). In making this determination all the evidence must be viewed in the light most favorable to the nonmovant. *Bradshaw v. McElroy*, 62 N.C. App. 515, 302 S.E.2d 908 (1983). Taking the facts in the light most favorable to plaintiff, Mae Goodman White properly claimed her dower interest. Therefore, the rule in *Cassada* applies and defendant could not adversely hold the Three Acre Tract against plaintiff until Mae Goodman White died in 1981. The record, however, shows that defendant's possession has been continuous and uninterrupted since 1981 and with nothing else appearing defendant's title would have ripened in September 1988, seven years after Mae Goodman White's death.

Plaintiff attempts to circumvent the running of the statutory period by alleging that the issue of ownership was raised in defend-

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ant's "counterclaim" to the petition for partition and that this tolled the running of the statutory period. We do not agree. Plaintiff filed her petition for partition in January 1987. Defendant filed his "counterclaim" on 18 March 1987 alleging that he and his wife owned the Three Acre Tract in fee simple. Even though the Three Acre Tract was not part of the partition petition, we will assume for the sake of argument that defendant's "counterclaim" was sufficient to place the issue of ownership in dispute. This being the case, the issue of ownership would have been raised within the statutory period of seven years. However, defendant voluntarily dismissed his "counterclaim" on 17 October 1990. Approximately one year later, some ten years after Mae Goodman White died, plaintiff filed the present action and attempted to tack onto defendant's "counterclaim" insisting that her action was timely under Rule 41(a) of the North Carolina Rules of Civil Procedure. Rule 41(a) provides:

Subject to the provisions of Rule 23(c) and of any statute of this State, an action or any claim therein may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before the plaintiff rests his case, or; (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action If an action commenced within the time prescribed therefor, or any claim therein, is dismissed without prejudice under this subsection, a new action based on the same claim may be commenced within one year after such dismissal unless a stipulation filed under (ii) of this subsection shall specify a shorter time.

N.C.G.S. § 1A-1, Rule 41(a) (1990). Although not specifically stated, defendant argues that it is implicit in Rule 41(a) that the party who took the voluntary dismissal is the only one who may refile within the prescribed time. We agree and find support for this position in *Georgia-Pacific Corp. v. Bondurant*, 81 N.C. App. 362, 344 S.E.2d 302 (1986). There this Court stated: "When a party properly takes a first voluntary dismissal of an action . . . that party then has one year to refile the same action" *Id.* at 365, 344 S.E.2d at 304 (emphasis added). Although plaintiff's interpretation of Rule 41(a) is creative, we find it to be without merit and hold that plaintiff did not assert her title to the Three Acre Tract within the seven year period. Accordingly we hold that defendant has acquired title to the property by adverse possession. The order of the trial court is hereby

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Affirmed.

Judges EAGLES and GREENE concur.

RICHARD BARDOLPH, SOL JACOBS, AND KATHRYN B. TROXLER, PLAINTIFFS v. STEPHEN G. ARNOLD, COMMISSIONER; W. DEAN DULL, CHAIRMAN OF THE BOARD OF COMMISSIONERS OF GUILFORD COUNTY; CHARLES R. FORRESTER, COMMISSIONER; JAMES H. LUMLEY, COMMISSIONER; JACKIE R. MANZI, COMMISSIONER; JAMES F. KIRKPATRICK, JR., COMMISSIONER; AND KATIE G. DORSETT, COMMISSIONER. DEFENDANTS

No. 9218SC871

(Filed 5 October 1993)

Counties § 36 (NCI4th)— information concerning upcoming referenda—expenditures by county commissioners to produce and distribute—no liability of commissioners

As a matter of law, the county commissioners of Guilford County could not be held personally liable, either at common law or pursuant to N.C.G.S. § 128-10, for expenditures of County funds used to produce and distribute information concerning upcoming referenda involving redistricting for the election of county commissioners and merger of the public schools of Guilford County.

Am Jur 2d, Municipal Corporations, Counties, and Other Political Subdivisions § 284 et seq.

Appeal by defendants from order entered 11 June 1992 by Judge W. Douglas Albright in Guilford County Superior Court. Heard in the Court of Appeals 31 August 1993.

The defendants appeal the partial denial of their motion to dismiss pursuant to North Carolina Rule of Civil Procedure 12(b)(6). The plaintiffs appeal the partial granting of the defendants' motion to dismiss on their cross-appeal.

Vance Barron, Jr. for plaintiff-appellees.

Womble Carlyle Sandridge & Rice, by Roddey M. Ligon, Jr. and Anthony H. Brett, for defendant-appellants Arnold, Dull, Forrester and Manzi.

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Pfaff, Elmore & Albright, by J. S. Pfaff, for defendant-appellants Arnold, Dull and Manzi.

ORR, Judge.

This case arises out of two referenda slated to be voted upon by the voters of Guilford County in the 5 November 1991 election. One involved a redistricting proposal for the election of county commissioners. The other involved the merger or non-merger of the public schools of Guilford County.

On 3 October 1991, at an open meeting, the Board of Commissioners of Guilford County voted to expend county funds for the printing and mailing of two brochures, as well as newspaper advertisements, which addressed the two issues involved in the referenda. All seven commissioners of Guilford County were present for the meeting, including Commissioners Arnold, Forrester, Dull, Manzi, Kirkpatrick, and Dorsett (defendants here); as well as Commissioner Calvin Hinshaw, who is not a defendant. Mr. Hinshaw resigned his office 25 October 1991. Defendant James Lumley was duly appointed as Hinshaw's replacement and sworn into office as a commissioner.

After a heated discussion during the meeting involving the text and possible political overtones of the proposed brochures and advertising, a motion was made by Commissioner Dull to allow preparation of those materials by Commissioner Arnold. The motion was seconded by Commissioners Manzi and Forrester. Commissioners Dorsett and Kirkpatrick voted against the motion. Commissioner Hinshaw voted with the majority.

Subsequent to the meeting, Arnold prepared two pamphlets, entitled "A Look at the Options and Costs Associated With the Referendum to Alter Public School Districts That Appears on the November 5th Ballot" and "Facts You Need To Know About the County Commissioners' Redistricting Plan Before You Vote on November 5, 1991." Additionally, two full-page advertisements were prepared for the major newspapers of Guilford County. The cost of these printings, mailings, and advertisements was in excess of \$35,000.00.

The plaintiffs in this case, citizens and residents of Guilford County, filed an action against all the commissioners (except Hinshaw and Lumley) on 31 October 1991, just prior to the local elections.

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On 1 November 1991, plaintiffs were granted a preliminary injunction enjoining the commissioners from distributing pamphlets to voters and publishing newspaper advertisements regarding referenda to be voted on in the election, and preventing further expenditures of public funds for dissemination or publishing of the disputed information.

In March 1992, plaintiffs filed an amended complaint which alleged, *inter alia*, that County Commissioners Manzi, Arnold, Dull, and Forrester were personally liable for those public funds spent prior to the November 1 injunction. The amended complaint alleged:

a) That the expenditures were for a private political purpose. The pamphlets and advertisements were published for the purpose of persuading the voters of Guilford County to cast their votes in a particular way in the referendums on school merger and redistricting that appeared on the ballot in Guilford County in the November 5, 1991 election. No adequate consideration moved to Guilford County. Notwithstanding the knowledge that the expenditures were unlawful, Commissioners Arnold, Dull, Forrester and Manzi willfully and intentionally authorized and approved the disbursement of the public funds of Guilford County with the intent to evade the law. Their actions were a fraudulent, corrupt and malicious misuse of public funds.

Defendants, members of the Board of Commissioners of Guilford County, challenge on appeal the denial of a Motion to Dismiss for failure to state a claim for relief, contending that the trial court erred in ruling that there may be a cause of action at common law against them in their capacity as commissioners. The plaintiffs, all taxpayers of Guilford County, have assigned as error in their cross-appeal the partial granting of the Motion to Dismiss for failure to state a claim, contending that N.C. Gen. Stat. § 128-10 permits an action against municipal officers such as the defendants.

The issue involved in both assignments is whether, as a matter of law, the county commissioners of Guilford County may be held liable, either at common law or pursuant to statutory authority, for expenditures of County funds used to produce and distribute information concerning the referenda in question. At the onset, we note that typically, a denial of a motion pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6), is an interlocutory order from which no appeal may be taken immediately. *State v. School*, 299 N.C. 351, 261 S.E.2d 908, *aff'd on rehearing*, 299 N.C. 731, 265 S.E.2d

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387, *appeal dismissed*, 449 U.S. 807, 101 S.Ct. 55, 66 L.Ed.2d 11 (1980). However, "where a decision of the principal question presented would expedite the administration of justice, or where the case involves a legal issue of public importance, appellate courts may exercise their discretion to determine such an appeal on its merits." *Flaherty v. Hunt*, 82 N.C. App. 112, 113, 345 S.E.2d 426, 427, *disc. review denied*, 318 N.C. 505, 349 S.E.2d 859 (1986), *quoting Stanback v. Stanback*, 287 N.C. 448, 215 S.E.2d 30 (1975) and *Moses v. Highway Commission*, 261 N.C. 316, 134 S.E.2d 664, *cert. denied*, 379 U.S. 930, 85 S.Ct. 327, 13 L.Ed. 342 (1964). The trial court found that the issues addressed in the instant case affected a substantial right of the parties within the meaning of on N.C.G.S. § 1-277, and suspended all further proceedings pending the outcome of this appeal. Therefore, we conclude that while this appeal is interlocutory, we shall, in our discretion, decide the merits in this case.

I.

Addressing initially the common law claim against the commissioners, we find that there is no North Carolina authority which allows for personal liability when elected officials vote to expend funds in the manner described in this case. As the defendants correctly point out, if there is a common law claim such as the one plaintiffs assert, elected officials could potentially risk their personal assets every time they voted on a controversial issue or exercised their political judgment in the expenditure of public funds. For that reason, the General Assembly has enacted specific statutory methods for addressing unlawful actions by elected officials.

The controlling case on this point is *Flaherty, supra*. In *Flaherty*, the plaintiff sued on behalf of the citizens and taxpayers of North Carolina, alleging that then Governor Hunt had improperly used state funds for political campaign purposes in that he used a state-owned aircraft without reimbursing the State. This Court held that "such actions [to recover wrongfully spent public funds] against municipal officers are statutory, the statute providing the basis for the action as well as procedural requirements." *Flaherty*, at 115, 345 S.E.2d at 428. The statutory remedy is ". . . explicit and *exclusive*." *Id.*, at 116, 345 S.E.2d at 429 (emphasis added). The Court pointed out that the statutory remedy in that case would be N.C.G.S. § 143-32, which provided for a criminal action instituted by the Attorney General against state officials who wrongfully divert funds for their own purposes. Therefore, for plain-

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tiffs to pursue the Commissioners in this case, they must rely upon a specific statutory cause of action as discussed in Part II of this opinion.

The authorities cited by the plaintiffs are not dispositive here, as those cases deal with knowing disregard or intentional circumvention of statutory requirements or actions by the board in absence of statutory authority. In *Horner v. Chamber of Commerce*, 231 N.C. 440, 57 S.E.2d 789 (1950), taxpayers sued the City of Burlington for distributing budget funds directly to the Chamber of Commerce, to be used for its day-to-day activities. *Brown v. Walker*, 188 N.C. 52, 123 S.E. 633 (1924), involved the town of Sylva's appropriation of \$5,000.00 to a trustee for the purchase of rights-of-way for the construction of a railroad, while *Moore v. Lambeth*, 207 N.C. 23, 175 S.E. 714 (1934), involved intentional and illegal circumvention of bidding requirements in order to award a contract to a specific construction company.

All of the above cited cases involved a third party's receipt of public funds, either without authorization or in direct violation of statute, rather than distribution of information to the public. In both *Brown* and *Horner*, *supra*, the recipients of the public funds were party defendants along with the municipal officers. In *Moore*, there were clear indications of criminal activity intended to avoid statutory bidding requirements.

Finally, the courts of North Carolina have determined that lobbying by local government to create support for local issues is permissible. *North Carolina ex rel. Horne v. Chafin*, 62 N.C. App. 95, 302 S.E.2d 281, *aff'd*, 309 N.C. 813, 309 S.E.2d 239 (1983), *appeal dismissed*, 466 U.S. 933, 104 S.Ct. 1902, 80 L.Ed.2d 452 (1984), involved lobbying of the state legislators by the City of Charlotte and the County Commissioners of Mecklenburg County. The taxpayer plaintiff objected to the expense of a reception held to present local issues and interests to the Legislature. This Court pointed out "[u]rging policies which benefit their constituents is one of the ways local officials promote their constituents' interests." *Horne*, 62 N.C. App. at 98, 302 S.E.2d at 284. If there is political disagreement as to what expenditures would promote the constituents' interest, "[p]laintiff's remedy is to air his opinion at the ballot box." *Id.*

We therefore conclude that the commissioners were vested with appropriate authority to expend the funds in question and

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plaintiffs' allegations that the information provided was slanted for political purposes does not sufficiently state a claim for relief. Likewise, the memorandum from the county attorney which states that ". . . such expenditure is lawful so long as the expenditure for this purpose is for publicity that is informational in nature and does not advocate one position over another . . ." did not say that the proposed brochures were illegal. Plaintiffs' contention that the commissioners circumvented the law because they allegedly ignored the advice of the county attorney is therefore without merit. Accordingly, the trial court's denial of the defendants' motion to dismiss the common law complaint is reversed.

II.

Plaintiffs contend on cross-appeal that the Commissioners of Guilford County may be held liable for their actions pursuant to N.C. Gen. Stat. § 128-10. We find that the aforementioned statute has no applicability to the facts of this case and accordingly affirm the trial court's decision.

N.C. Gen. Stat. § 128-10 states in pertinent part that

[w]hen an official of a county, city or town is liable upon his bond for unlawfully and wrongfully retaining by virtue of his office a fund, or a part thereof, to which the county, city or town is entitled, any citizen and taxpayer may, in his own name for the benefit of the county, city or town, institute suit and recover from the delinquent official the fund so retained. Any county commissioners, aldermen, councilmen or governing board who fraudulently, wrongfully or unlawfully permit an official so to retain funds shall be personally liable therefor

Without an official who is "liable on his bond", as well as commissioners who refuse to take action against that official, no action arises under this section. The statute specifically identifies the narrow circumstances and persons that could be held liable for retaining funds by virtue of their office, and only allows for liability on the part of commissioners when and if they fail to recover the wrongfully held funds from the bonded officer.

The section does not create an initial cause of action against commissioners, but rather establishes a derivative remedy, requiring both retained funds by a bonded officer and refusal to act by commissioners. The allegations and the pleadings indicate that

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neither of these factors are present in the instant case, therefore, dismissal was proper pursuant to N.C.G.S. § 1A-1, Rule 12(b)(6), for failure to state a claim for which relief can be granted.

For the above stated reasons, we affirm the decision of the trial court with respect to the granting of defendant's motion to dismiss the plaintiff's claim pursuant to N.C.G.S. § 128-10, and reverse his denial of the motion to dismiss the common law claim. We accordingly remand for an entry of judgment dismissing the complaint.

Affirmed in part, reversed and remanded in part.

Chief Judge ARNOLD and Judge WELLS concur.

IN RE ADOPTION OF LARRY WAYNE DUNCAN, MINOR CHILD

No. 9118SC902

(Filed 5 October 1993)

1. Adoption or Placement for Adoption § 4 (NCI4th) — adoption proceeding transferred by clerk to superior court — jurisdiction of court

The superior court had jurisdiction over this adoption proceeding where the court acquired jurisdiction at the moment the clerk transferred the case; the clerk was directed by the language of N.C.G.S. § 1-273 to transfer the case to the court once issues of fact and law regarding the natural parents' consent to the adoption, DSS's consent to the adoption, and a pending action in New Jersey became considerations; the superior court acquires original jurisdiction of any special proceeding sent to it from the clerk on any ground whatever, even where proceedings were improperly brought before the clerk; and the district court, which originally gained jurisdiction over the child as a neglected child, properly terminated its jurisdiction once the adoption petition was filed.

Am Jur 2d, Adoption §§ 49, 69, 70.

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[112 N.C. App. 196 (1993)]

2. Adoption or Placement for Adoption § 43 (NCI4th)— clerk's rescission of interlocutory decree of adoption—trial court's authority to set aside

The trial court could properly set aside the clerk's rescission of the interlocutory decree of adoption, since once the superior court acquires jurisdiction, the trial judge may set aside a previous order of the clerk without finding an abuse of discretion or error of law by the clerk.

Am Jur 2d, Adoption § 65 et seq.

Appeal by intervenors from order entered 10 May 1991 by Judge Julius A. Rousseau, Jr. in Guilford County Superior Court. Heard in the Court of Appeals 22 September 1992.

This action was initiated as an adoption action before the Clerk of Superior Court on 7 May 1990. Sharon and Ernest Duncan, former foster parents of Larry Wayne Tarlton (Duncan), filed a petition seeking to adopt the minor child, born 15 September 1988. The natural parents, Susan Elizabeth Tarlton and Larry Wayne Sweeney, consented to the adoption by the Duncans. Their consents were filed with the petition.

Prior to the commencement of the above adoption action, the minor child was found to be a neglected child within the meaning of N.C. Gen. Stat. § 7A-517(21) by the district court in a juvenile action entitled 89-J-257, and removed from the custody of his natural mother. He was placed in the legal and physical custody of the Guilford County Department of Social Services (DSS). As a result of the district court's order, Larry was initially placed in the foster home with the Duncans on 11 August 1989.

Shortly thereafter, the child's guardian ad litem and attorney advocate made a motion with the court requesting that DSS initiate a home study on Trina and Martin Puglisi, the first cousins of the child's mother. The Puglisis were residents of Montvale, New Jersey. The court ordered the study which was completed by New Jersey social services officials on 22 January 1990. The resulting report highly recommended the Puglisis as caretakers. The court held a hearing on or about 1 May, at which time the court ordered that legal custody remain with DSS, and ordered that physical custody of the child be placed with the Puglisis as of Saturday, 5 May 1990. Both natural parents appealed the decision, and an

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additional hearing was held on 4 May to determine the temporary custody of the child pending those appeals. Also on 4 May 1990, the foster parents, the Duncans, contacted DSS indicating a desire to adopt the child and stating that the child's parents were with them and that they wished to execute consent agreements.

In response to this information, the Deputy County Attorney for DSS and the Attorney Advocate for the minor child moved the court requesting immediate action. The motion stated, "[T]his private consent to adoption is in direct conflict to the purpose of the prior Court Orders and that it is in direct conflict to the best interests of the juvenile; that the Court has previously determined that it is in the best interests of the juvenile to be placed in the physical custody of Mr. and Mrs. Martin Puglisi." An *ex parte* order was issued by the district court placing immediate physical custody of the child with the Puglisis.

The following Monday, 7 May 1990, the Duncans filed the above-mentioned petition for adoption before the Clerk of Superior Court of Guilford County. Consent to Adoption forms were also submitted, signed by Susan Tarlton and Larry Sweeney, the biological parents. The Duncans also moved to intervene in the juvenile action and moved to stay the custody order.

On 31 August 1990, the Clerk of Superior Court entered an interlocutory decree of adoption pursuant to N.C. Gen. Stat. § 48-17. Responding to that decree, on 4 September 1990, the district court relieved DSS of legal custody, relieved the Puglisis of physical custody, and ordered that the child be returned to North Carolina for placement with Mr. and Mrs. Duncan. The district court then terminated its jurisdiction of the minor child.

On 15 October 1990, the Supreme Court of New Jersey granted a stay of the North Carolina district court's order to return the child, finding that New Jersey had limited jurisdiction of the matter "based on the physical presence of plaintiffs [the Puglisis] and the child, which exercise of jurisdiction should be directed only to the physical custody of the child, implicating his safety, health, and well-being, until such time as the courts of the State of North Carolina can conduct a hearing on the application for interim and permanent relief." The Court then remanded the matter to the lower court of that state to "communicate to the North Carolina court this Court's view of the need for the holding of a best interest hearing in North Carolina."

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The next day, the Puglis is then moved to intervene in the adoption action in North Carolina and requested a "best interest" hearing. On 4 December, the Assistant Clerk of Superior Court allowed the motion to intervene.

The Clerk of Superior Court subsequently ordered that the adoption proceedings be transferred to the Superior Court of Guilford County. In his order, the clerk found that "[b]oth the Petitioners and the Intervenor Petitioners are in agreement that the Assistant Clerk of Superior Court should transfer the matter of the Adoption of the minor child to the Superior Court for a full hearing as to the best interests of the minor child in all matters."

A hearing in the case was scheduled in the Superior Court of Guilford County for 1 April 1991; however, it was continued by the Puglis is prior to that date. On 10 April 1991, the Clerk of Superior Court by order rescinded the Interlocutory Decree of Adoption due to inconsistencies found in the adoption petitions filed by the Duncans, and further ordered that no final order of adoption be entered by the Clerk or any assistant clerk ". . . until all matters pending before the Superior Court are resolved."

Both the Duncans and the Puglis is filed motions before the Superior Court the following week. The Puglis is moved to dismiss the action pursuant to Rule 12(b)(1), (3), and (6), of the North Carolina Rules of Civil Procedure. Mr. and Mrs. Duncan moved that the Clerk's rescission of the interlocutory decree be set aside.

Following a hearing on those motions, the trial court found that the Superior Court of Guilford County had exclusive jurisdiction over the adoption and the child, that the district court had terminated its jurisdiction, that the order of the New Jersey court was to be considered in whether the best interests of the child would be protected by allowing the Duncans to proceed with the adoption, and that an evidentiary hearing should be held as soon as possible to determine the best interests of the child. The court also ordered that the order of the clerk of the superior court rescinding the interlocutory order of adoption be set aside. The intervenor-appellants appeal from this order.

C. Richard Tate, Jr. for intervenor-appellants.

Adams & Osteen, by J. Patrick Adams, for appellees.

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Intervenor-appellants contend that the trial court committed reversible error in denying their motion to dismiss, arguing that the Superior Court does not have jurisdiction over these adoption proceedings. They further argue that the trial court erred in setting aside the Clerk's rescission of the interlocutory decree of adoption. We disagree with those contentions, and accordingly affirm the court's decisions and remand for an evidentiary hearing on the best interests of the minor child.

Larry Wayne Tarlton (Duncan) was born on 15 September 1988. Since his birth, he has been kidnapped, adjudicated as a neglected child, placed in a foster home, and sent to New Jersey. The record indicates that his young life has been a continuous series of temporary measures by various adults intending to provide for his "best interests." His natural father was in prison at the time DSS first became involved with the case; his mother was living in a shelter. The Duncans, petitioner-appellees here, kept Larry as foster parents pursuant to a contract with DSS from August 1989, after the district court determined him to be a neglected child, until May 1990, when the court found that it was in his "best interest" to live with his maternal cousins. The Puglisis, the intervenor-appellants, have had Larry in their physical custody since that time.

[1] It is well settled in North Carolina that in any case involving the adoption of a child, ". . . the court's paramount concern is the child's welfare." *Oxendine v. Dept. of Social Services*, 303 N.C. 699, 708, 281 S.E.2d 370, 376 (1981). Further, the provisions of Chapter 48 (Adoptions), Chapter 50 (Divorce and Alimony), and Chapter 50A (Uniform Child Custody Jurisdiction Act) (UCCJA), the various statutes at issue here, all have as their central focus, their "polar star", the best interests of the minor child. See N.C.G.S. §§ 48-1(3) (1991), 50-13.1, 50-13.2(a) (1987 and 1992 Supp.), and 50A-1(a)(1), (2) (1989). With that in mind, we proceed to the issues presented.

N.C. Gen. Stat. § 48-12 states, "Adoption shall be by a special proceeding before the clerk of the superior court." The only procedure for the adoption of minors is that prescribed by G.S. Chapter 48. "A superior court judge has no jurisdiction in adoption proceedings except upon appeal from the clerk." *In re Daughtridge*, 25 N.C. App. 141, 145, 212 S.E.2d 519, 521 (1975).

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However, “[w]henever a civil action or special proceeding begun before the clerk of a superior court is *for any ground whatever* sent to the superior court before the judge, the judge has jurisdiction; and it is his duty, upon the request of either party, to proceed to hear and determine all matters in controversy in such action” N.C.G.S. § 1-276 (1983) (emphasis added). The superior court acquires original jurisdiction of any special proceeding sent to it from the clerk on any ground whatever, even where proceedings were improperly brought before the clerk. *Bradshaw v. Warren*, 216 N.C. 354, 4 S.E.2d 883 (1939). Moreover, “[i]f issues of law and of fact, or of fact only, are raised before the clerk, he *shall transfer* the case to the civil issue docket for trial of the issues” N.C.G.S. § 1-273 (1983) (emphasis added). Where an issue of fact is raised in a special proceeding, it must be determined by the court. *In re Adoption of Searle*, 74 N.C. App. 61, 63, 327 S.E.2d 315, 317 (1985).

It is clear that the Superior Court acquired jurisdiction at the moment the clerk transferred the case. The clerk was in fact directed by the language of G.S. § 1-273 to transfer the case to the court once issues of fact and law regarding the natural parents' consent to the adoption, DSS's consent to the adoption, and the pending action in New Jersey became considerations. There is no question that the applicable statutes conferred jurisdiction on the court in the adoption proceeding.

The intervenor-appellant's right to physical custody of the child was by order from the district court. The district court gained jurisdiction over the child as a neglected child pursuant to N.C.G.S. § 7A-517(21). The district court properly terminated its jurisdiction once the adoption petition was filed. “Jurisdiction over adoption proceedings is vested solely in superior court. Thus, the district court has no jurisdiction to act once a petition for adoption is filed, and its jurisdiction is in abeyance once the petition is filed.” *In re James S.*, 86 N.C. App. 364, 366, 357 S.E.2d 430, 431 (1987). Since the jurisdiction of the district court, which “undoubtedly possesses *general* subject matter jurisdiction over child custody disputes”, *Sloop v. Friberg*, 70 N.C. App. 690, 693, 320 S.E.2d 921, 923 (1984), had ended, and the Supreme Court of New Jersey had held that the provisions of the UCCJA conferred only limited jurisdiction upon that court “until such time as the courts of the State of North Carolina can conduct a hearing”, the only proper forum for the evidentiary hearing was the Superior Court

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of Guilford County. Additionally, in their brief before this Court, appellants “. . . concede that the Superior Court [and clerk] have jurisdiction over this adoption proceeding.”

[2] Finally, as to the clerk's rescission of the interlocutory decree of adoption, we find that N.C.G.S. § 48-18 is typically dispositive, providing that “[s]uch decree shall be provisional only and may be rescinded or modified at any time prior to the final order.” However, once the superior court acquires jurisdiction, the trial judge may set aside a previous order of the clerk, without finding an abuse of discretion or error of law by the clerk. *Bynum v. Fidelity Bank*, 219 N.C. 109, 12 S.E.2d 898 (1941). Therefore, the trial court was within its discretion to set aside the decree without the necessity of findings of fact or conclusions of law justifying the determination.

We therefore hold for all of the above reasons that the Superior Court of Guilford County is the proper forum for disposition of this matter and affirm the decision of the trial court.

Affirmed.

Judges WELLS and GREENE concur.

IN THE MATTER OF MORGAN SAMUEL WARD, III

No. 9214SC1015

(Filed 5 October 1993)

Incompetent Persons § 14 (NCI4th)— incompetency hearing—no authority of clerk to reopen—order null and void

The clerk of superior court does not have authority to rehear an adjudication of incompetency based on the consent of the parties; therefore the clerk's order entered after reopening the incompetency proceeding was null and void, and the trial court properly dismissed petitioner's appeal therefrom. N.C.G.S. §§ 35A-1207, 35A-1130.

Am Jur 2d, Incompetent Persons §§ 8-25.

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[112 N.C. App. 202 (1993)]

Appeal by petitioner Imperial Trucking Company, Inc. from order signed 11 August 1992 and filed 12 August 1992 by Judge Jack Thompson in Durham County Superior Court dismissing petitioner's appeal. Heard in the Court of Appeals 17 September 1993.

On 16 August 1990, John Constantinou, as respondent Morgan Samuel Ward, III's "Attorney [and] Best Friend" filed a petition with the Clerk of Durham County Superior Court to adjudicate Ward incompetent. This matter came before the Clerk of Court on 13 September 1990. On 11 October 1990, the Clerk of Court entered an order finding that Ward had "continuously and without interruption been an incompetent adult since December 23, 1987" and that Ward continued to be incompetent and in need of a guardian at the time of the hearing. Based on this finding, the Clerk appointed Constantinou as Ward's general guardian.

Subsequently, in September 1991, Petitioner Imperial Trucking Company, Inc. ("Imperial") filed a "Motion in the Cause" pursuant to N.C. Gen. Stat. § 35A-1207 to reopen the incompetency proceeding and give all parties an opportunity to be heard in the matter. Constantinou, as Ward's guardian, consented to reopen the proceeding so that all interested parties could have the right to be heard and to contest the proceeding as it related to the alleged incompetency and date of onset of incompetency. On 10 October 1991, based on this consent, the Clerk of Court reopened the incompetency proceeding.

On 12 June 1992, after a hearing, the Clerk of Court signed an order concluding that Ward has been an incompetent adult since 16 August 1990, the date Constantinou filed the petition for adjudication of incompetence. Further, the order affirmed the appointment of Constantinou as Ward's general guardian.

On 19 June 1992, Imperial filed an appeal from this order in Durham County Superior Court. Subsequently, on 1 July 1992, Constantinou, as Ward's guardian, filed a motion to dismiss this appeal. Judge Jack Thompson entered an order granting this motion on 11 August 1992. From this order, Imperial appeals.

Haywood, Denny, Miller, Johnson, Sessoms & Patrick, by George W. Miller, Jr. and Robert E. Levin, for petitioner-appellant.

John M. Constantinou for respondent-appellee.

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ORR, Judge.

The historical background for this appeal arises out of an automobile accident on 23 December 1987 in which respondent Morgan Samuel Ward, III was injured near Winnie, Texas by a vehicle owned by Imperial Trucking Company, Inc. In January 1990, Ward filed a suit against Imperial and Charles H. Black, the driver of the vehicle owned by Imperial, in the United States District Court for the Middle District of North Carolina. Imperial filed a motion to dismiss for lack of personal jurisdiction, and Ward moved for a change of venue. An order was entered granting Imperial's motion to dismiss and Ward's motion to change venue to the Southern District of Texas. On 13 November 1990, Ward filed a voluntary dismissal in this action.

During the pendency of this suit, on 16 August 1990, Ward's attorney, John Constantinou, filed a petition with the Durham County Clerk of Superior Court to adjudicate Ward incompetent. On 11 October 1990, an order was entered by the Durham County Clerk of Superior Court finding that Ward had been incompetent since the date of the accident, appointing Constantinou as Ward's general guardian, and concluding that the "[g]eneral [g]uardian shall be allowed to file a personal injury action for the ward without further permission from this Court".

On 14 November 1990, Ward, through his guardian Constantinou, instituted a personal injury action against Imperial and Black in Brazoria County District Court, Texas for the injuries sustained in the automobile accident of 23 December 1987. According to Imperial's brief, it was alleged in this action that Ward's incompetency tolled the statute of limitations.

Upon learning that Ward had been adjudicated incompetent, Imperial filed a Motion in the Cause under N.C. Gen. Stat. § 35A-1207 to reopen the incompetency adjudication of Ward in Durham County Superior Court. On 10 October 1991, the Clerk of Durham County Superior Court signed an order stating that Constantinou, as Ward's guardian, agreed to reopen the proceeding, and based on this consent, the Clerk reopened the incompetency adjudication of Morgan Samuel Ward, III.

After a hearing, on 12 June 1992, the Clerk of Court entered an order modifying the previous order. In this order, the Clerk of Court found that Ward has been an incompetent adult since

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23 December 1987, but that the court did not have the authority to declare a respondent incompetent prior to the institution of an incompetency determination proceeding. Thus, the Clerk concluded as a matter of law that Ward has been an incompetent adult since 16 August 1990, the date Constantinou filed the petition for adjudication of incompetence in this action. Further, the order affirmed the appointment of Constantinou as Ward's general guardian.

On 19 June 1992, Imperial filed a notice of appeal from this order in Durham County Superior Court requesting a trial *de novo*. On 1 July 1992, Constantinou filed a motion to dismiss this appeal, which motion the trial court granted in an order signed 11 August 1992 by Judge Jack Thompson.

The sole issue on appeal is whether Imperial had a right to appeal the Clerk's order of 12 June 1992 that adjudicated Ward an incompetent adult and to a trial *de novo* in this matter in the superior court. Chapter 35A of the North Carolina General Statutes governs incompetency proceedings. Article 1 of Chapter 35A, entitled "Determination of Incompetence", "establishes the exclusive procedure for adjudicating a person to be an incompetent adult or an incompetent child." N.C. Gen. Stat. § 35A-1102 (1987). Further, "[t]he clerk in each county shall have original jurisdiction over proceedings under this Subchapter." N.C. Gen. Stat. § 35A-1103(a) (1987).

Under N.C. Gen. Stat. § 35A-1105 (Cum. Supp. 1992),

[a] verified petition for the adjudication of incompetence of an adult, or of a minor who is within six months of reaching majority, may be filed with the clerk by any person, including any State or local human resources agency through its authorized representative.

"Within five days after filing of the petition, the clerk shall issue a written notice of the date, time, and place for a hearing on the petition" N.C. Gen. Stat. § 35A-1108(a) (1987). After such hearing,

[i]f the finder of fact, whether the clerk or the jury, finds by clear, cogent, and convincing evidence that the respondent is incompetent, the clerk shall enter an order adjudicating the respondent incompetent. The clerk may include in the order findings on the nature and extent of the ward's incompetence.

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N.C. Gen. Stat. § 35A-1112(d) (1987). "Appeal from an order adjudicating incompetence shall be to the superior court for hearing *de novo* and thence to the Court of Appeals." N.C. Gen. Stat. § 35A-1115 (1987). Thus, N.C. Gen. Stat. § 35A-1115 grants the right of appeal and trial *de novo* from an order adjudicating incompetence under Article 1 of Chapter 35A to the superior court.

In the present case, after Constantinou followed the proper procedures outlined under Article 1 of Chapter 35A for adjudicating an incompetent adult, the Clerk of Court entered an order adjudicating Morgan Samuel Ward, III incompetent, from which no appeal was taken. Subsequently, Imperial filed a Motion in the Cause pursuant to N.C. Gen. Stat. § 35A-1207 (1987) to "reopen" Ward's adjudication proceeding.

N.C. Gen. Stat. § 35A-1207 is found in Subchapter II, Article 4 of Chapter 35A. Subchapter II deals solely with issues of guardianship. N.C. Gen. Stat. § 35A-1207(a) states:

Any interested person may file a motion in the cause with the clerk in the county where a guardianship is docketed *to request modification of the order appointing a guardian or guardians or consideration of any matter pertaining to the guardianship.*

(Emphasis added.) N.C. Gen. Stat. § 35A-1207 does not provide for reopening an incompetency hearing. Thus, the Clerk of Court did not have the authority to base his reopening and subsequent rehearing of this case on this statute. Instead, the Clerk reopened the case and held a rehearing on the merits of Ward's adjudication of incompetence based on the consent of the parties. However, our review of Chapter 35A shows no authority under which the Clerk of Court can rehear an adjudication of incompetency based on the consent of the parties.

Article 1 of Chapter 35A gives the Clerk of Court the authority to enter an order adjudicating a person incompetent upon a petition and after a hearing pursuant to Article 1. From this order, an appeal lies to the superior court for a trial *de novo*. N.C. Gen. Stat. § 35A-1115 (1987). Therefore, jurisdiction over an adjudication of incompetency lies with the Clerk of Court under Article 1, and jurisdiction over an appeal from an order entered by the Clerk pursuant to Article 1 lies with the superior court. No statute in Chapter 35A gives the Clerk the authority to rehear an adjudication

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of incompetency once he has entered this order; thus the Clerk has no jurisdiction for such a rehearing. *See Ridge Community Investors, Inc. v. Berry*, 293 N.C. 688, 696, 239 S.E.2d 566, 571 (1977) (citations omitted) (“The clerk of the superior court has no common law or equitable jurisdiction. . . . The clerk is a court “of very limited jurisdiction—having only such jurisdiction as is given by statute.” ’ ’); *See also Boone v. Sparrow*, 235 N.C. 396, 403, 70 S.E.2d 204, 209 (1952) (the clerk of superior court may only exercise jurisdiction in civil cases as provided by statute).

The only other provision in Chapter 35A which provides for the Clerk holding a hearing on the merits of a person’s incompetency is found in Article 3, which Article is entitled “Restoration to Competency.” N.C. Gen. Stat. § 35A-1130 (1987) of Article 3 states:

(a) The guardian, ward, or any other interested person may petition for restoration of the ward to competency by filing a motion in the cause of the incompetency proceeding with the clerk who is exercising jurisdiction therein. The motion shall be verified and shall set forth facts tending to show that the ward is competent.

(b) Upon receipt of the motion, the clerk shall set a date, time, and place for a hearing

. . . .

(d) If the clerk or jury finds by a preponderance of the evidence that the ward is competent, the clerk shall enter an order adjudicating that the ward is restored to competency. . . .

. . . .

(f) If the clerk or jury fails to find that the ward should be restored to competency, the clerk shall enter an order denying the petition. The ward may appeal from the clerk’s order to the superior court for trial de novo.

This statute does not, however, provide for modifying a previous order adjudicating a person incompetent. It merely provides for a hearing to determine if the incompetent ward should be restored to competency, and, if it is found that the ward should not be restored to competency, it gives the Clerk the authority to enter an order “denying the petition.” This statute does not give the Clerk the authority to enter an order modifying a previous order of incompetency. Thus, the Clerk does not have jurisdiction under

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this statute to reopen an incompetency proceeding, hold a rehearing, and enter an order modifying the previous order of incompetency. Further, under this statute, only the ward may appeal from the Clerk's order, and in the present case, Imperial is the appellant.

Thus, we conclude that the Clerk did not have the authority, and therefore, the jurisdiction to rehear Ward's adjudication of incompetency under Chapter 35A based on the consent of the parties. We therefore conclude that the Clerk's order of 12 June 1992 is null and void. *See In re Custody of Sauls*, 270 N.C. 180, 187, 154 S.E.2d 327, 333 (1967) (citation omitted) ("Jurisdiction over the subject matter cannot be conferred upon a court by consent"); *See also Waters v. McBee*, 244 N.C. 540, 548, 94 S.E.2d 640, 645 (1956) ("Defendant could not, by consent, confer on the court the power to hear a controversy not within the authority given it by the Legislature"). Accordingly, we affirm the trial court's dismissal of petitioner's appeal.

Affirmed.

Judges EAGLES and GREENE concur.

STATE OF NORTH CAROLINA v. JOHN DAVID McCLAIN, JR.

No. 925SC13

(Filed 5 October 1993)

1. Rape and Allied Offenses § 5 (NC13d)— first-degree rape and sexual offense—failure to show defendant was aided and abetted—failure to dismiss error—no new trial—verdict treated as guilty of second-degree rape

The trial court erred in denying defendant's motion to dismiss the charges for first-degree rape and first-degree sexual offense because the State failed to prove that defendant was aided and abetted in the commission of the offenses by one or more persons as charged in the indictments; however, a new trial is not required since the verdict must be regarded as a verdict of guilty of second-degree rape and second-degree sexual offense.

Am Jur 2d, Rape §§ 1, 2, 28.

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2. Constitutional Law § 328 (NCI4th) — eight and one-half months between indictment and trial—no denial of speedy trial

The trial court did not err in denying defendant's motion to dismiss on the basis that he was denied a speedy trial, though there was a delay of eight and one-half months from the date of the first indictment to the date of the trial, since much of the delay was the result of the State's attempt to have DNA sampling and other tests performed on defendant; samples were taken from defendant but not sent to the lab, but there was no evidence that this mistake was willful; and there was no prejudice to defendant arising out of the delay.

Am Jur 2d, Criminal Law §§ 656, 860.

Appeal by defendant from judgments entered 22 April 1991 by Judge Ernest B. Fullwood in New Hanover County Superior Court. Heard in the Court of Appeals 10 February 1993.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Thomas D. Zweigart, for the State.

Appellate Defender Malcolm Ray Hunter, Jr., by Assistant Appellate Defender Mark D. Montgomery, for defendant appellant.

COZORT, Judge.

On 22 April 1992, defendant was convicted of one count of first degree rape, one count of second degree rape, one count of first degree kidnapping, one count of possession of cocaine, two counts of delivery of cocaine, one count of possession of drug paraphernalia, one count of first degree sexual offense, one count of second degree sexual offense, and one count of crime against nature. Judge Ernest Fullwood sentenced defendant to life in prison for the first degree rape, life in prison for the first degree sexual offense, forty years in prison for first degree kidnapping, five years in prison for possession of cocaine, ten years in prison for delivery of cocaine, forty years in prison for second degree sexual offense, ten years in prison for crime against nature consolidated with possession of drug paraphernalia, and forty years in prison for second degree rape to be served at the expiration of the ten-year sentence for crime against nature consolidated with possession of drug paraphernalia. Defendant appeals. We reverse the judgments on

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first degree rape and first degree sexual offense and remand for resentencing; no error on the remaining issues.

The State presented the following evidence. On 19 July 1990, Ms. Gustafson, aged seventeen, and her friend, Ms. Fink, went to the Good Shepherd Shelter for lunch. While there, defendant asked Ms. Gustafson and Ms. Fink if they wanted to "get high." Ms. Gustafson and Ms. Fink agreed and went with defendant to defendant's brother's house. Defendant's nephew then joined defendant, Ms. Gustafson, and Ms. Fink. Defendant and his nephew conferred privately and told the girls that they were going to a house. At the abandoned house defendant passed around a crack cocaine pipe and then asked his nephew which girl he wanted. Defendant threatened to kill Ms. Gustafson if she did not do as she was told. Defendant's nephew took Ms. Gustafson into another room and forced her to have oral sex and sexual intercourse with him. Defendant attempted to force Ms. Fink to perform oral sex. Defendant then told his nephew to leave the house; his nephew complied. Defendant instructed Ms. Gustafson to remove her clothes, had sexual intercourse with her, and forced her to perform oral sex. Defendant threatened to kill Ms. Gustafson if she did not do what he told her for the remainder of the day. Defendant then told Ms. Fink to leave and gave her directions back to the Good Shepherd Shelter. At approximately 2:00 p.m. defendant took Ms. Gustafson to another house where he forced her to have sexual intercourse or oral sex with ten men. Defendant gave Ms. Gustafson more crack cocaine and forced her to have sexual intercourse with him about eight times and perform oral sex about four or five times.

After Ms. Fink returned to the Good Shepherd Shelter she told a worker that Ms. Gustafson had been kidnapped by defendant. At approximately 3:30 p.m., Ms. Fink and a friend began looking for Ms. Gustafson. She did not initially call the police because she was afraid defendant would kill Ms. Gustafson if he found out the police were looking for him. At approximately 7:30 p.m., Ms. Fink approached Wilmington Police Sergeant George Hickman, described defendant, and told Sergeant Hickman that defendant had kidnapped Ms. Gustafson. Police officers then began to search for defendant and Ms. Gustafson. Soon after Ms. Fink's report, Sergeant Hickman found defendant and Ms. Gustafson. Ms. Gustafson told Sergeant Hickman that she was assaulted and raped. Defendant was taken into custody.

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Defendant presented no evidence. On appeal, defendant argues that the trial court erred in (1) denying his motion to dismiss the charges for first degree rape and first degree sexual offense; (2) instructing the jury on first degree rape and first degree sexual offense; (3) refusing to inquire whether a member of the audience had a conversation with one of the jurors concerning the case; and (4) denying defendant's motion to dismiss for lack of speedy trial and denying defendant's motion for the prosecutor to testify on the matter of defendant's speedy trial.

[1] In his first assignment of error, defendant seeks a new trial, arguing that the trial court erred in denying his motion to dismiss the charges for first degree rape and first degree sexual offense because the State failed to prove that defendant "was aided and abetted in the commission of [the offenses] by one or more persons" as charged in the indictments. In reviewing the denial of a motion to dismiss, we must consider the evidence in the light most favorable to the State to determine if there is substantial evidence of each element of the crimes charged. *State v. Barnette*, 304 N.C. 447, 458, 284 S.E.2d 298, 305 (1981). If the State fails to offer substantial evidence of any of the essential elements of the crime charged, the trial court must grant defendant's motion to dismiss. *See id.*

N.C. Gen. Stat. § 14-27.2 (1986) defines first degree rape as vaginal intercourse by force against the will of the victim when the perpetrator (1) employs or displays a deadly weapon or an article which the victim reasonably believes to be a dangerous or deadly weapon; or (2) inflicts serious personal injury upon the victim or another person; or (3) the perpetrator commits the offense aided and abetted by one or more other persons. N.C. Gen. Stat. § 14-27.4 (1986) defines first degree sexual offense as a sexual act with another person by force and against the will of the victim when the perpetrator (1) employs or displays a deadly weapon or an article which the victim reasonably believes to be a dangerous or deadly weapon; or (2) inflicts serious personal injury upon the victim or another person; or (3) the perpetrator commits the offense aided and abetted by one or more persons. The indictments state that defendant committed the offenses while aided and abetted by one or more persons.

In *Barnette*, the North Carolina Supreme Court defined an aider and abettor as

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a person who is actually or constructively present at the scene of the crime and who aids, advises, counsels, instigates or encourages another to commit an offense. Even though not actually present during the commission of the crime, a person may be an aider or abettor if he shares the criminal intent of the perpetrator and if, during the commission of the crime, he is in a position to render any necessary aid to the perpetrator.

Id. at 458, 284 S.E.2d at 305 (citations omitted). We agree with defendant that the State failed to present substantial evidence that defendant was aided and abetted by another during the commission of the crimes charged. The State's evidence shows that defendant told his nephew to leave the house *prior* to the rape and sexual offense committed against Ms. Gustafson. Although there is evidence that defendant's nephew threatened Ms. Gustafson prior to defendant's offenses, there is no evidence that, at the time of defendant's offenses, his nephew was encouraging and aiding him or that his nephew was in a position to render aid to him. Since the State failed to prove that defendant was aided and abetted by another, an essential element of the crimes of first degree rape and first degree sexual offense, we find that the trial court erred in failing to dismiss those charges. Accordingly, we reverse the judgments based on the first degree rape charge and first degree sexual offense charge.

We do not find, however, that reversal requires a new trial, as contended by defendant. In *State v. Perry*, 291 N.C. 586, 231 S.E.2d 262 (1977), the North Carolina Supreme Court vacated the judgment imposing sentence upon the defendant for first degree rape because the indictment was insufficient to charge all the elements of first degree rape. The Court declined to send the case back for a new trial. Rather, the Court found first, that the indictment sufficiently charged all the elements of second degree rape, and second, that the jury, by its verdict, had found the defendant guilty of all the elements of second degree rape. *Id.* at 591-92, 231 S.E.2d at 266. The Court concluded that the verdict must be regarded as a verdict of guilty of second degree rape. *Id.* at 595, 231 S.E.2d at 268. The Court remanded the case to correct the verdict to guilty of second degree rape and to sentence the defendant for second degree rape. *Id.* at 597-98, 231 S.E.2d at 269.

We find the Supreme Court's reasoning in *Perry* applicable to this case. The trial court charged the jury below on the elements

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of first and second degree rape and first and second degree sexual offense. By finding defendant guilty of first degree rape and first degree sexual offense, the jury necessarily found the defendant guilty of all the elements of second degree rape and second degree sexual offense. Following *Perry*, we remand the case to correct the verdicts to second degree rape and second degree sexual offense and for imposition of sentence for those two offenses.

[2] We next consider whether the trial court erred in denying defendant's motion to dismiss on the basis that he was denied a speedy trial as required by the United States Constitution and the North Carolina Constitution. "To determine whether a defendant's right to a speedy trial has been denied, four factors must be examined: the length of the delay, reasons for the delay, defendant's assertion of the right, and prejudice suffered by the defendant." *State v. Joyce*, 104 N.C. App. 558, 568, 410 S.E.2d 516, 522 (1991) (citing *Barker v. Wingo*, 407 U.S. 514, 530, 33 L.Ed.2d 101, 117 (1972)), *disc. review denied*, 331 N.C. 120, 414 S.E.2d 764 (1992). The factors are considered together in determining whether defendant's Sixth Amendment rights have been violated. *Id.*

The record shows a delay of eight and one-half months from the date of the first indictment to the date of the trial. The State initially sought evidentiary tests, consisting of DNA sampling and hair sampling, which generally take approximately five months. Samples were taken from defendant in November 1990. In January 1991, the State discovered that the samples had not been sent to the lab as requested. Samples were then sent to the lab; the samples could no longer be used. The State then decided not to obtain additional samples. Defendant first filed a motion for speedy trial on 12 October 1990, which motion was denied. On 22 January 1991, defendant filed another motion for speedy trial; the motion was not heard. On 1 April 1991, defendant filed a motion to dismiss on the grounds that he had been denied a speedy trial. At the time of defendant's first motion, two other men were under indictment for rape for their actions at the second house. By the time of defendant's trial in April 1991, the charges against the two men had been dropped and both testified for the State.

Reviewing the four *Barker* factors, we find the trial court did not err in denying defendant's motion to dismiss for lack of a speedy trial. The length of the delay "is not *per se* determinative of whether a violation has occurred." *State v. Jones*, 310 N.C.

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716, 721, 314 S.E.2d 529, 533 (1984). Although defense counsel stated at the 15 October 1990 hearing that he believed the issue would be one of consent, not identification, and therefore DNA sampling would be irrelevant, we cannot find that the State acted improperly in taking steps to preserve and develop evidence which might prove essential to the State's case. The State had no guarantee that defendant would not assert an identification defense at a later date. Although there was a delay because the samples were not sent to the lab as originally directed, there is no evidence that the mistake was willful. Defendant asserted his right to speedy trial early on and did not object merely as a matter of form. Finally, we find no prejudice to defendant arising out of the delay. Although rape charges were dropped against two original codefendants who later testified for the State, the charges were not dropped in order to secure the favorable testimony, but rather because the prosecuting witness stated that the men did not know that she was not consenting. There is nothing in the record to indicate that the original codefendants would have exercised their right to remain silent. The testimony may have been offered even if the charges had not been dismissed. Defendant's motion to dismiss was properly denied.

Finally, we find that the trial court did not err in denying defendant's request to compel the district attorney to testify as to the reasons for delay. At the time of the motion, the State had already presented the reasons for the delay. Defendant's argument is overruled.

Our ruling on defendant's first assignment of error renders his second assignment of error moot. We have considered defendant's argument concerning improper juror contact and find it to be without merit.

In summary, the judgments on first degree rape and first degree sexual offense are reversed, and the case is remanded for correction of verdict and entry of judgments on second degree rape and second degree sexual offense; otherwise, no error.

No error in part, reversed and remanded in part.

Judges EAGLES and WYNN concur.

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[112 N.C. App. 215 (1993)]

IN THE MATTER OF THE APPEALS OF NORTHERN TELECOM, INC.
FROM ORDERS OF THE DURHAM COUNTY BOARD OF COMMISSIONERS
CONCERNING ASSESSMENTS FOR TAX YEARS 1984-1991

No. 9210PTC245

(Filed 5 October 1993)

**Taxation § 25.10 (NCI3d)— Property Tax Commission—order
signed by Chairman after expiration of term—void**

An order of the Property Tax Commission finding the County's assessment of NTI's business personal property null and void which was entered by Chairman Pinna on 4 November 1991 was itself null and void because Pinna's successor was appointed to the Commission by Governor Martin on 17 October and signed an oath of affirmation for the position on 1 November; thus, Pinna was no longer a member of the Commission when he entered the order. Although NTI contended that entry was merely a ministerial act and that the order was valid and binding when approved by a majority of Commissioners in September, entry of this order was necessary for it to be final and binding in light of the fact that no decision was ever rendered in this action prior to entry of the order. Finally, although the Commission entered an order on 4 February 1992 finding that the 4 November 1991 order was "a true and proper Order setting forth the findings and conclusions of a majority of the Members of the Commission who were present at the hearing held 13 June 1991," the statutory scheme which grants the Commission the authority to enter such orders does not give the Commission the authority to determine whether a previous order of the Commission is valid and binding.

Am Jur 2d, Public Officers and Employees § 304.

Appeal by Durham County and cross-appeal by Northern Telecom, Inc. from order entered 4 November 1991 by Chairman William P. Pinna of the North Carolina Property Tax Commission. Heard in the Court of Appeals 16 March 1993.

On 20 November 1989, 5 June 1990, and 17 August 1990, Durham County (the "County") issued discovery tax assessments against Northern Telecom, Inc. ("NTI") for its business personal property located in Durham County on the ground that NTI had substantially

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under-listed the amount and value of this property. In the 20 November 1989 assessment, the County assigned a value of \$135,000,000 to NTI's business personal property for 1984. In the 5 June 1990 assessment, the County assigned NTI's property a value of \$1,179,422,917 for the 1985-1990 tax years. These valuations were reduced by the 17 August 1990 assessment to a total value of \$402,200,894 for the 1984-1990 tax years.

NTI appealed the tax assessment valuation to the County Board of Commissioners (the "Board"), which appeal was heard on 22 October 1990. On 23 October 1990, the Board upheld "[t]he assessment of the Durham County Assessor's Office, as well as the appropriate penalties" and informed NTI the total value assigned to the property for the 1984-1990 tax years was \$400,729,094, which amount reflected an "adjustment made for 1987 for inventory in transit." On 20 November 1990, NTI filed an appeal from this assessment with the North Carolina Property Tax Commission (the "Commission").

In addition, on 27 December 1990, NTI appealed these assessments to the Board, and on 29 January 1991, the County officially notified NTI of the Board's decision to deny this appeal. On 27 February 1991, NTI filed an appeal of the Board's decision with the Property Tax Commission. In both appeals to the Commission, NTI excepted to the County's valuation of NTI's business personal property.

On 24 May 1991, the Commission entered a final decision in an unrelated case in which it held a discovery assessment null and void based on its finding that a contingency fee contract between the county in that case and an auditor was void as against public policy. On 31 May 1991, the County in the present case filed a motion *in limine* to prohibit NTI from presenting any evidence regarding a contingency fee auditing contract between the County and Tax Equity Consultants, Inc. ("TEC"). On this same day, the County invalidated this contract. On 5 June 1991, NTI filed a motion with the Commission to declare the discovery assessment void as violating public policy through the use of a contingency fee contract in the auditing process.

These two motions were heard by the Commission on 13 June 1991. On 4 November 1991, Chairman William P. Pinna entered an order for the Commission concluding as a matter of law that the contract between the County and TEC was void as against

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public policy and that the County's discovery assessment was a direct result of this contract. Based on these conclusions, the Commission held the discovery tax assessments for 1984 through 1991 null and void and prohibited the County from using any information acquired through the contingency fee contract in future assessments. Further, the Commission held that its order does not preclude the County from initiating a proper discovery under N.C. Gen. Stat. § 105-312. From this order, the County appeals, and NTI cross-appeals.

Robinson Maready Lawing & Comerford, by William F. Maready and Michael L. Robinson, for appellant/cross-appellee the County of Durham.

Maupin Taylor Ellis & Adams, P.A., by Charles B. Neely, Jr., Nancy S. Rendleman and Linda F. Nelson, for appellee/cross-appellant Northern Telecom, Inc.

ORR, Judge.

This appeal involves the tax assessment for business personal property owned by Northern Telecom, Inc. in Durham County. The County appeals from the order of the Property Tax Commission finding its discovery tax assessment null and void based on a contingency fee contract between the County and an outside auditing firm, TEC. NTI cross-appeals the Commission's failure to consider NTI's constitutional arguments that relate to the contingency fee contract.

Before we address these arguments, however, we must first address the County's contention that the order signed by Chairman Pinna is null and void based on the ground that at the time of the issuance of the order, three individuals signing the order were not lawful members of the Commission.

On 13 June 1991, this action was heard before the Property Tax Commission. At this time, the five members constituting the Commission were Chairman William P. Pinna, Vice-Chairman James C. Spencer, Jr., Oliver W. Alphin, Clarence E. Leatherman, and John A Cocklereece. On 4 November 1991, Chairman William Pinna entered the order for the majority holding that the tax assessment was void, and Vice-Chairman Spencer and Leatherman dissented. By 4 November 1991, however, the terms of Leathermen, Spencer,

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and Pinna as Commissioners for the Tax Commission had expired, and Pinna's successor had been appointed.

Thus, the issue on appeal is whether the order entered on 4 November 1991 by Chairman Pinna after Pinna's term had expired as a Commissioner on the Property Tax Commission and Pinna's successor to the Commission had been appointed is valid and binding. We hold that the order is not valid based on our conclusion that Chairman Pinna did not have the authority to enter an order after the expiration of his term on the Commission.

The Property Tax Commission is created by N.C. Gen. Stat. § 105-288(a) (1992) which states:

(a) Creation and Membership.—The Property Tax Commission is created. It consists of five members, three of whom are appointed by the Governor and two of whom are appointed by the General Assembly. . . . The terms of the members appointed by the Governor and of the member appointed upon the recommendation of the President Pro Tempore of the Senate are for four years. Of the members appointed for four-year terms, two expire on June 30 of each odd-numbered year. The term of the member appointed upon the recommendation of the Speaker of the House of Representatives is for two years and it expires on June 30 of each odd-numbered year. . . .

Further, under this statute, the Property Tax Commission sits as the "State Board of Equalization and Review for the valuation and taxation of property in the State." N.C. Gen. Stat. § 105-288(b) (1992).

Appeals to the Commission as the State Board of Equalization and Review are governed by N.C. Gen. Stat. § 105-290 (1992) which states:

(b) . . . The Property Tax Commission shall hear and decide appeals from decisions concerning the listing, appraisal, or assessment of property made by county boards of equalization and review and boards of county commissioners. Any property owner of the county may except to an order of the county board of equalization and review or the board of county commissioners concerning the listing, appraisal, or assessment of property and appeal the order to the Property Tax Commission.

. . .

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(3) On the basis of the findings of fact and conclusions of law made after any hearing provided for by this subsection (b), the Property Tax Commission *shall enter an order* (incorporating the findings and conclusions) reducing, increasing, or confirming the valuation or valuations appealed or listing or removing from the tax lists the property whose listing has been appealed. A certified copy of the order shall be delivered to the appellant and to the clerk of the board of commissioners of the county from which the appeal was taken, and the abstracts and tax records of the county shall be corrected to reflect the Commission's order.

N.C. Gen. Stat. § 105-290(b)(3) (1992) (emphasis added).

Thus, under these statutes, the Property Tax Commission has the authority to sit as a board of equalization to hear appeals from valuation and taxation of property in North Carolina, to make findings of fact and conclusions in these appeals, and to enter orders "reducing, increasing, or confirming the valuation or valuations appealed or listing or removing from the tax lists the property whose listing has been appealed" consistent with these findings and conclusions.

In the present case, on 4 November 1991, Chairman Pinna entered the order for the Commission finding the County's assessment of NTI's business personal property null and void. Subsequently, by letter dated 17 October 1991, Pinna's successor, James Vosburgh, was appointed to the Commission by Governor Martin, and on 1 November 1991 Vosburgh signed an oath of affirmation for this position. Thus, when Pinna entered the Commission's order, he was no longer a member of the Commission. Because the authority to enter this order comes from being appointed as a member of the Property Tax Commission pursuant to the statutes set out previously, Pinna's authority to enter the order ended when his term expired. The order entered by Pinna is, therefore, null and void and of no legal effect. *See Capital Outdoor Advertising, Inc. v. City of Raleigh*, 109 N.C. App. 399, 400-01, 427 S.E.2d 154, 155, *disc. review allowed, motion to dismiss denied*, 333 N.C. 789, 430 S.E.2d 424 (1993) (except by consent of the parties, judgment entered by a superior court judge out of session, out of term, and out of the county and judicial district where the hearing was held is "null and void and of no legal effect."); *See also Nationwide*

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Mutual Ins. Co. v. Anderson, 111 N.C. App. 248, 431 S.E.2d 552 (1993).

NTI argues, however, that because entry of the order was "merely a ministerial act", the Commission's order was valid and binding when a majority of the Commissioners approved the order at their meeting in September. We disagree. The record is void of any evidence that the Commission rendered its decision by notifying the parties until its order was actually signed and entered.

Although as between the parties a duly rendered judgment may be valid and effective without entry, and its enforcement does not always depend on its entry, the statutes generally require judgments to be entered and for many purposes they are not complete, perfect, and effective until this is done.

As a general rule, the decisions of all courts must be preserved in writing in some record provided for that purpose. Where a statute so requires, judgments should be entered, and for many purposes a judgment is not complete, perfect, and effective until it has been duly entered. Thus it has been broadly held that judgments take effect only from the date of entry, and that there is no judgment until it is entered of record.

49 C.J.S. § 107 (footnotes omitted).

In the present case, the parties were not notified of the Commission's decision until the Commission's order was entered on 4 November 1991. There is no evidence to show that a Commissioner could not change his vote before the final entry of the order. In fact, two Commissioners were preparing a dissent, which dissent could have persuaded any of the other Commissioners in the majority to change their vote. Further, in order to appeal the Commission's order to this Court, the order had to have been entered. See *Searles v. Searles*, 100 N.C. App. 723, 725, 398 S.E.2d 55, 56 (1990) ("entry of judgment is jurisdictional[, and] this Court is without authority to entertain an appeal where there has been no entry of judgment."). Thus, we conclude that entry of this order was necessary for it to be final and binding, in light of the fact that no decision was ever rendered in this action prior to entry of the order. See *Fitch v. Fitch*, 26 N.C. App. 570, 216 S.E.2d

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734, *cert. denied*, 288 N.C. 240, 217 S.E.2d 679 (1975). NTI's argument is therefore without merit.

We also note that NTI refers to another order of the Commission as evidence that the 4 November 1991 order was valid and binding. On 4 February 1992, the Commission entered an order finding that the 4 November 1991 order of the Commission was "a true and proper Order setting forth the findings and conclusions of a majority of the Members of the Commission who were present at the hearing held 13 June 1991." This order does not, however, persuade us to alter our decision.

As previously stated, the Property Tax Commission has the authority to sit as a board of equalization and review to hear appeals from valuation and taxation of property in North Carolina, to make findings of fact and conclusions in these appeals, and to enter orders "reducing, increasing, or confirming the valuation or valuations appealed or listing or removing from the tax lists the property whose listing has been appealed" consistent with these findings and conclusions. *See* N.C. Gen. Stat. § 105-290. The statutory scheme which grants the Commission the authority to enter such orders does not, however, give the Commission the authority to determine whether a previous order of the Commission is valid and binding. Thus, the 4 February 1992 decision of the Commission does not alter our conclusion that the 4 November 1991 order is null and void.

Based on our holding that the order is null and void, we need not address the remaining assignments of error arising out of this order. Accordingly, we vacate the order of the Commission.

Vacated.

Judges WELLS and MARTIN concur.

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BRETT BRADLEY REID, PLAINTIFF v. J. E. "ED" ROBERTS, DANNY TOLAR, KEN PUTNAM, RON BRAZIL, DANNY BRIDGES, JACK WOODSON, BOBBY LANGFORD, BILL ELLER, BILLIE RAY, HOWARD LUNSFORD, BOBBY HOLLYFIELD, GORDON KING, PAUL LANGFORD, HAROLD ROBERTS, GERALD FISHER, W. E. HAMLIN, INDIVIDUALLY AND IN THEIR OFFICIAL CAPACITIES AS EMPLOYEES OF THE NORTH CAROLINA DEPARTMENT OF TRANSPORTATION, DEFENDANTS

No. 9228SC448

(Filed 5 October 1993)

1. Public Officers and Employees § 35 (NCI4th) — DOT district engineers — public officers — no individual liability for negligence

Plaintiff's complaint did not state a claim against three DOT district engineers in their individual capacities for permitting foliage to obscure a stop sign and cause an accident, since defendants were public officers rather than employees; they could not be held individually liable for mere negligence; and plaintiff did not allege that the actions of defendants were corrupt, malicious, outside of and beyond the scope of their duties, in bad faith, or willful and deliberate.

Am Jur 2d, Public Officers and Employees §§ 358 et seq., 375.

2. Public Officers and Employees § 35 (NCI4th) — DOT maintenance employees — foliage obscuring stop sign — no individual liability

Plaintiff's complaint failed to state a claim against DOT highway maintenance employees in their individual capacities for permitting foliage to obscure a stop sign and cause an accident since the law does not impose a duty on individual employees of the DOT extending to the general public beyond the duty to use due care in the performance of specific tasks which they have undertaken, and plaintiff's complaint failed to allege negligent acts or omissions by defendant employees while they were involved in a particular task.

Am Jur 2d, Public Officers and Employees §§ 358 et seq., 375.

Appeal by plaintiff from order entered 31 January 1992 by Judge C. Walter Allen in Buncombe County Superior Court. Heard in the Court of Appeals 12 April 1993.

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Plaintiff filed a complaint alleging negligence. Defendants moved to dismiss. Plaintiff voluntarily dismissed his claim against defendants "in their official capacities as employees of the North Carolina Department of Transportation." The trial court dismissed plaintiff's action against defendants in their individual capacities pursuant to N.C.R. Civ. P. 12(b)(6). From this order plaintiff appeals.

Coward, Hicks, Siler & Harper, P.A., by Richard B. Harper; and Whalen, Hay, Pitts, Hugenschmidt, Master, Devereux & Belser, P.A., by Sean P. Devereux, for plaintiff appellant.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Charlie C. Walker, for defendant appellees.

ARNOLD, Chief Judge.

The sole issue is whether or not plaintiff's complaint states a cause of action for negligence against sixteen state employees in their individual capacities. For the reasons stated below, we affirm.

The test on a Rule 12(b)(6) motion is whether or not the complaint is legally sufficient. *Tennessee v. Environmental Management Comm'n*, 78 N.C. App. 763, 765, 338 S.E.2d 781, 782 (1986). In ruling upon such motion, the trial court must view the allegations of the complaint as admitted and on that basis must determine as a matter of law whether or not the allegations state a claim for which relief may be granted. *Id.*

Plaintiff alleged the following in his complaint: On 10 June 1988 at approximately 6:00 p.m., plaintiff was driving his motorcycle on River Road when he collided with a truck at the intersection of River Road and Woodfin Avenue (the intersection), causing him severe injuries. The man driving the truck did not see the stop sign on Woodfin Avenue because it was obscured by foliage. Weeds had grown up from the ground at the base of the stop sign, and branches from one or more trees or bushes were growing beside and over the stop sign. The Department of Transportation (DOT) had a duty to maintain the intersection. At the time of the accident, defendants were employed by DOT and acting within the course and scope of their employment which included the duty to maintain the intersection. Specifically, they had a duty to keep foliage from obscuring the stop sign on Woodfin Avenue at the intersection. Defendants had actual or constructive notice of the dangerous con-

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dition of the intersection. Defendants were negligent in maintaining the intersection and as a result plaintiff suffered severe injuries.

Plaintiff further alleged the following: Defendants owed a duty to plaintiff as a member of the motoring public to keep the shrubbery trimmed around the stop sign and/or place the sign where there was appropriate visibility. Defendants' breach of this duty caused plaintiff's injuries.

[1] The defendants who are public officers, rather than employees, cannot be held individually liable for mere negligence.

When a governmental worker is sued individually, or in his or her personal capacity, our courts distinguish between public employees and public officers in determining negligence liability. A public officer sued individually is normally immune from liability for "mere negligence." An employee, on the other hand, is personally liable for negligence in the performance of his or her duties proximately causing an injury.

A public officer is someone whose position is created by the constitution or statutes of the sovereign. "An essential difference between a public office and mere employment is the fact that the duties of the incumbent of an office shall involve the exercise of some portion of sovereign power." Officers exercise a certain amount of discretion, while employees perform ministerial duties. Discretionary acts are those requiring personal deliberation, decision and judgment; duties are ministerial when they are "absolute, certain, and imperative, involving merely the execution of a specific duty arising from fixed and designated facts."

Hare v. Butler, 99 N.C. App. 693, 699-700, 394 S.E.2d 231, 236 (citations omitted), *disc. review denied*, 327 N.C. 634, 399 S.E.2d 121 (1990).

The immunity afforded to public officers is qualified. A public officer is shielded from liability unless he engaged in discretionary actions which were allegedly: (1) corrupt, *Wiggins v. City of Monroe*, 73 N.C. App. 44, 49, 326 S.E.2d 39, 43 (1985); (2) malicious, *id.*; (3) outside of and beyond the scope of his duties, *id.*; (4) in bad faith, *Hare*, 99 N.C. App. at 700, 394 S.E.2d at 236; or (5) willful and deliberate, *Harwood v. Johnson*, 92 N.C. App. 306, 310, 374 S.E.2d 401, 404 (1988).

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Plaintiff alleged that defendant J. E. "Ed" Roberts was district engineer and that he was responsible for (1) "insuring the safety of the motoring public at all roadway intersections within the district," and (2) "devising and enforcing a system for response to reports of obstructed signs or other malfunctioning traffic control devices." Plaintiff further alleged that Roberts's duties included (1) "overall supervision of and control over the placement, operation and maintenance of all traffic control devices," and (2) "maintenance of safe and proper sight distances at all roadway intersections within the district." Accepting these allegations as true, it appears that Roberts exercises some portion of the sovereign power. Accordingly, we hold that Roberts is a public officer immune from liability for mere negligence.

Plaintiff alleged that defendant Danny Tolar was assistant district maintenance engineer and then later district maintenance engineer and that he was also responsible for "devising and enforcing a system for response to reports of obstructed signs or other malfunctioning traffic control devices." Plaintiff further alleged that Tolar's duties included "supervision of and control over the placement, operation and maintenance of all traffic control devices as well as maintenance of safe and proper sight distances at all roadway intersections within the district." Taking these allegations as true, it appears that Tolar exercises some portion of the sovereign power. Accordingly, we hold that Tolar is a public officer immune from liability for mere negligence.

Plaintiff alleged that Roberts and Tolar acted with gross negligence in failing to: (1) "establish a regular schedule of inspection and maintenance of stop signs"; (2) "maintain a system of recording and responding to reports of an obstructed stop sign"; (3) "take the necessary steps, despite notice of its condition, to restore the stop sign on Woodfin Avenue at River Road to a safe condition"; and (4) "adequately supervise those employees responsible for maintaining stop signs free from obstruction." Plaintiff did not allege that the actions of Roberts and Tolar were corrupt, malicious, outside of and beyond the scope of their duties, in bad faith, or willful and deliberate. Even had he, we would reject such characterizations based on these allegations. Therefore, plaintiff's complaint is not legally sufficient to state a claim against Roberts or Tolar.

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Plaintiff alleged that defendant Ken Putnam was district traffic engineer and his duties included: (1) "the placement, operation and maintenance of all traffic control devices as well as establishment and maintenance of safe and proper 'sight distances' at all roadway intersections within the division"; (2) "supervision of those [DOT] employees responsible for maintenance of all stop signs free from obstruction and and [sic] maintenance of a safe and proper 'sight distance.'" Accepting these allegations as true, it appears that Putnam exercises some portion of the sovereign power. Accordingly, we hold that Putnam is a public officer immune from liability for mere negligence.

Plaintiff alleged that Putnam was negligent in failing to: (1) maintain the stop sign; (2) take steps to correct the obstructed stop sign after he received notice that it created a dangerous condition; (3) adequately supervise his subordinates in their maintenance of the intersection; (4) implement DOT regulations concerning the maintenance of traffic control devices within his district. Plaintiff did not allege that Putnam's actions were corrupt, malicious, outside of and beyond the scope of his duties, in bad faith, or willful and deliberate. Even had he, we would reject such characterizations based on these allegations. Therefore, plaintiff's complaint is not legally sufficient to state a claim against Putnam.

[2] As for the remaining defendants, even if we treat them as public employees, the claims against them were properly dismissed. The law provides that a public employee may be sued in his individual capacity for negligence in the performance of his or her duties, *Hare*, 99 N.C. App. at 700, 394 S.E.2d at 236, but this provision assumes that a plaintiff can establish all the requisite elements of a negligence claim. One such requisite element is a duty, imposed by law, which the defendant owes to the plaintiff. *Coleman v. Cooper*, 89 N.C. App. 188, 192, 366 S.E.2d 2, 5, *disc. review denied*, 322 N.C. 834, 371 S.E.2d 275 (1988). The question here is does the law impose a duty on the individual *employees* of the DOT, that extends to the general public, beyond the duty to use due care in the performance of the specific tasks they undertake. We hold that it does not.

In his complaint, plaintiff sets forth defendants' job descriptions, every one of which includes some sort of duty relating to highway maintenance. Plaintiff argues that these duties, which defendants owe to DOT, create a duty which extends to plaintiff

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[112 N.C. App. 222 (1993)]

to keep traffic signals free from obstructions. Plaintiff then argues that failure to remove the obstructions from in front of the stop sign constitutes a negligent omission for which each defendant is liable. We disagree that the individual employees owed plaintiff a duty.

The duty owing to the public to maintain highways falls upon the DOT, N.C. Gen. Stat. § 143B-346 (1990), not the individual DOT employees. It is true that public employees have been subjected to liability for their own negligence. In those situations, however, the employees directly participated in the events which caused the plaintiffs' injuries. See, e.g., *Wirth v. Bracey*, 258 N.C. 505, 128 S.E.2d 810 (1963) (negligent operation of patrol car); *Miller v. Jones*, 224 N.C. 783, 32 S.E.2d 594 (1945) (negligence in road work). In those cases, the negligent acts or omissions were intertwined with the specific tasks the employees were performing. We hold that because defendants here were not involved in a particular task, no duty to plaintiff arose, and they should not be exposed to liability. The trial court, therefore, properly dismissed the complaint for failure to state a claim upon which relief may be granted.

Plaintiff's reliance on *Phillips v. North Carolina Dept. of Transp.*, 80 N.C. App. 135, 341 S.E.2d 339 (1986), is misplaced. Plaintiff cites this case for the proposition that each defendant owed him a duty to maintain safe conditions on the highway, but *Phillips* establishes only that the DOT owed plaintiff that duty.

Affirmed.

Judges COZORT and LEWIS concur.

HOUSE OF RAEFORD FARMS v. STATE EX REL. ENVIR. MGMT. COMM.

[112 N.C. App. 228 (1993)]

HOUSE OF RAEFORD FARMS, INC., A NORTH CAROLINA CORPORATION AND
NASH JOHNSON AND SONS FARMS, INC., A NORTH CAROLINA CORPORATION
v. STATE OF NORTH CAROLINA EX REL. ENVIRONMENTAL
MANAGEMENT COMMISSION AND DEPARTMENT OF ENVIRONMENT,
HEALTH AND NATURAL RESOURCES

No. 924SC875

(Filed 5 October 1993)

**Administrative Law and Procedure § 30 (NCI4th)— petition for
contested case hearing not timely filed—dismissal by ad-
ministrative law judge proper—time for filing not tolled by
superior court action—no jurisdiction in OAH from Court of
Appeals decision**

The superior court erred in reversing a decision of an administrative law judge dismissing petitioners' petition for a contested case hearing on the basis that the Office of Administrative Hearings lacked subject matter jurisdiction over the petition which was filed beyond the 60-day time period specified by N.C.G.S. § 150B-23(f); furthermore, OAH did not obtain jurisdiction by virtue of an earlier opinion of the Court of Appeals in the case, and petitioners' initial attack on respondent's decision in superior court did not toll the time for filing a contested case petition in OAH.

Am Jur 2d, Administrative Law §§ 340-375.

Appeal by respondent from judgment entered 12 June 1992 by Judge Frank R. Brown in Duplin County Superior Court. Heard in the Court of Appeals 31 August 1993.

Attorney General Lacy H. Thornburg, by Associate Attorney General Edwin L. Gavin, II and Associate Attorney General Billy R. Godwin, Jr., for respondent-appellant.

Jordan, Price, Wall, Gray & Jones, by Henry W. Jones, Jr. and Jeffrey S. Whicker, for petitioners-appellees.

McCRODDEN, Judge.

This appeal presents the issue of whether the superior court erred in reversing a decision of an administrative law judge (ALJ) dismissing petitioners' petition for a contested case hearing on the basis that the Office of Administrative Hearings (OAH) lacked

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[112 N.C. App. 228 (1993)]

subject matter jurisdiction over the petition which was filed beyond the 60-day time period specified by N.C. Gen. Stat. § 150B-23(f) (1991). Subsidiary issues pertain to whether OAH obtained jurisdiction by virtue of an earlier opinion of this Court in the case and whether petitioners' initial attack on respondent's decision in superior court tolled the time for filing a contested case petition in OAH.

The facts of the controversy are as follows. On 29 February 1988, petitioners and respondent entered into a consent judgment to settle ten cases then pending. The ten cases arose out of respondent's assessments of civil penalties against petitioners for violations of the environmental laws of North Carolina. On 12 May 1989, respondent assessed an additional \$294,449.20 in civil penalties and investigative costs against petitioners. On 19 May 1989, Superior Court Judge Henry L. Stevens, III heard arguments from both parties and found that the superior court had jurisdiction over the additional civil penalties even though petitioners had not proceeded under the Administrative Procedure Act (APA), N.C. Gen. Stat. §§ 150B-1 to -52 (1991 and Supp. 1992). On 10 July 1989, petitioners and respondent again argued whether the superior court had jurisdiction over the civil penalties before Judge D. Marsh McLelland. By judgment of 12 June 1989, Judge McLelland found that the superior court had subject matter jurisdiction and set aside the \$294,449.20 in penalties and investigative costs.

Both petitioners and respondent appealed the judgment to the Court of Appeals. This Court in *State ex rel. Envir. Mgmt. Comm. v. House of Raeford Farms*, 101 N.C. App. 433, 400 S.E.2d 107, *disc. review denied*, 328 N.C. 576, 403 S.E.2d 521 (1991), held, *inter alia*, that the superior court lacked subject matter jurisdiction over the civil penalties because petitioners had failed to exhaust their administrative remedies under the APA by failing to commence a contested case in OAH and obtain a final decision. Thereafter on 26 March 1991, petitioners filed a petition for a contested case hearing in OAH, and on 29 May 1991, respondent filed a motion to dismiss the petition, pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(1) (1990). On 9 August 1991, the ALJ granted respondent's motion and dismissed the petition, concluding that the agency lacked subject matter jurisdiction because petitioners failed to file their petition in a timely manner. On 3 September 1991, petitioners filed a petition for judicial review and request for temporary stay in Duplin County Superior Court pursuant to N.C.G.S. § 150B-43. The trial court reversed the final decision of the ALJ, finding that

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[112 N.C. App. 228 (1993)]

the ALJ's decision was not supported by the findings of fact, was made upon unlawful procedure, was affected by other error of law, and was arbitrary and capricious.

The standard of review for the court charged with reviewing an agency's decision, in this case the superior court, is that the court may reverse or modify the agency's decision if the substantial rights of the petitioner have been prejudiced because the agency's findings, conclusions, or decisions are:

- (1) In violation of constitutional provisions;
- (2) In excess of the statutory authority or jurisdiction of the agency;
- (3) Made upon unlawful procedure;
- (4) Affected by other error of law;
- (5) Unsupported by substantial evidence admissible under G.S. 150B-29(a), 150B-30, or 150B-31 in view of the entire record as submitted; or
- (6) Arbitrary or capricious.

N.C.G.S. § 150B-51. In our review of the superior court's decision under this statute, we confine ourselves to whether the superior court made any errors of law in view of the record as a whole. *Scroggs v. North Carolina Criminal Justice Educ. & Training Stds. Comm'n*, 101 N.C. App. 699, 702, 400 S.E.2d 742, 744 (1991).

The right to appeal an administrative agency ruling is statutory, and compliance with statutory provisions is necessary. *Lewis v. N.C. Dept. of Human Resources*, 92 N.C. App. 737, 739, 375 S.E.2d 712, 714 (1989). Section 150B-23(f) governs both the procedure and the time limitation for filing a petition for a contested case hearing. It states that, unless otherwise provided, the "limitation for the filing of a petition in a contested case is 60 days. The time limitation . . . shall commence when notice of the agency decision is given to all persons aggrieved" N.C.G.S. § 150B-23(f) (emphasis added). The language of this statute leaves no room for judicial construction because it clearly provides that a petition must be filed within the 60-day limitation. See *Gummels v. N.C. Dept. of Human Resources*, 98 N.C. App. 675, 392 S.E.2d 113 (1990) (upholding

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[112 N.C. App. 228 (1993)]

ALJ's order dismissing a petition for a contested case hearing where the petition was mailed, but not filed, within the 30-day deadline); *Lewis*, 92 N.C. App. 737, 375 S.E.2d 712 (upholding the dismissal of an employee grievance appeal because it was filed one day late). In the instant case, petitioners received notice of assessment of civil penalties and costs on 15 May 1989, and then filed a petition for a contested case hearing well outside the 60-day period, on 26 March 1991.

In order to avoid the import of section 150B-23(f) and the decisions applying it, petitioners argue that this Court, in *House of Raeford*, instructed OAH to adjudicate the civil penalties and costs assessed by respondent, notwithstanding the timeliness of the filing of the petition. In the 10 June 1992 judgment, the trial judge asserted that *House of Raeford* "indicated that the petitioners should return to OAH for a determination of the propriety of the penalties and cost assessments." To support this finding, petitioners refer to the following language in the opinion as instructions to OAH to assume jurisdiction over the civil fines: "[Petitioners] may raise this argument [that the one-year statute of limitations barred the agency from assessing penalties for violations occurring more than one year before the assessment] in their request for an administrative hearing." We cannot agree with this interpretation. This Court did *not* direct OAH to adjudicate the assessment of penalties if OAH did not have subject matter jurisdiction over the petition, and its opinion is devoid of any instruction that OAH assert jurisdiction over the adjudication of penalties, regardless of the timeliness of petitioner's petition. Indeed, such a reading would grant to this Court authority it does not have: to confer upon OAH subject matter jurisdiction not created by statute. Accordingly, we not only disagree with petitioners that the *House of Raeford* Court directed OAH to assume jurisdiction over the penalties, we do not believe the Court *could* direct OAH to assume jurisdiction.

Petitioners also contend that the 1989 superior court orders "cut short" administrative review of the civil penalties and costs assessed by respondent, thereby tolling the time for filing a contested case petition. Petitioners cite, and we can find, no support for the proposition that its selection of the wrong forum, *i.e.*, one which did not have subject matter jurisdiction, tolled the 60-day time limitation period.

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Petitioners finally urge that strict enforcement of the 60-day deadline would result in manifest unfairness, because petitioners would be unable to contest the assessment of penalties. Although we find the result to be unfortunate, we cannot say that it is manifestly unfair. The record shows that respondent provided petitioners with information of the process to contest the assessment of penalties in OAH, and the record discloses no bad faith on the part of respondent. Additionally, respondent has maintained throughout the litigation that the superior court lacked subject matter jurisdiction over the controversy and that petitioners must exhaust administrative remedies before proceeding in superior court. We believe that petitioners were put on notice that they were jeopardizing their ability to contest the fines in a contested case hearing by proceeding in superior court.

Since petitioners failed to file their petition for a contested case hearing within 60 days after they received notice of the agency decision, OAH was without subject matter jurisdiction over the petition, and the ALJ properly dismissed the petition. The trial court's reversal of this dismissal cannot stand. We reverse and remand to the superior court for an order consistent with this opinion.

Reversed and remanded.

Judges WELLS and ORR concur.

JOAN TUCKER CORNES v. HARVEY JESS HALL

No. 9217SC928

(Filed 5 October 1993)

**1. Automobiles and Other Vehicles §§ 829, 542 (NCI4th)—
pedestrian struck in shopping center parking lot—public vehic-
ular area**

The area where an accident occurred was a public vehicular area and not a roadway where plaintiff was struck by defendant's pickup truck as she and her husband left a Food Lion grocery store in a typical strip shopping center; there was a paved area approximately thirty feet wide between the stores

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and the parking lot; and that area consisted of a ten foot wide parcel pick-up lane immediately in front of the store and a twenty foot wide traffic lane. Although the lot was held open for use by the public, there is no evidence in this record that the general public has a legally enforceable right to use the lot and, because the parking lot is not open to the use of the general public as a matter of legal right, the lot is not a highway as defined in N.C.G.S. § 20-4.01(13) and therefore cannot be a roadway. N.C.G.S. § 20-4.01(32).

Am Jur 2d, Automobiles and Highway Traffic §§ 477, 478.

2. Automobiles § 542 (NCI4th) — pedestrian struck in traffic lane at shopping center—duty of care of pedestrian

The trial court erred in an automobile negligence case by instructing the jury that plaintiff pedestrian was required to yield the right of way under N.C.G.S. § 20-174(a). That statute was inapplicable because plaintiff was crossing a public vehicular area rather than a roadway. No North Carolina statutory or case law was found describing the duty of care required of a pedestrian crossing a public vehicular area; under the common law, pedestrians have a duty to maintain a lookout when crossing an area where vehicles travel and a duty to exercise reasonable care for their own safety.

Am Jur 2d, Automobiles and Highway Traffic §§ 477, 478.

3. Automobiles and Other Vehicles § 559 (NCI4th) — contributory negligence—law of state—comparative fault—not adopted

The doctrine of contributory negligence has been followed in North Carolina since 1869; comparative fault is not the law of this State and it is beyond the Court of Appeals' authority to abandon the doctrine of contributory negligence and adopt the doctrine of comparative fault.

Am Jur 2d, Automobiles and Highway Traffic §§ 414 et seq., 475.

4. Automobiles and Other Vehicles § 613 (NCI4th) — pedestrian struck while in shopping center traffic lane—directed verdict on contributory negligence—evidence not sufficient

The evidence was not sufficient for a directed verdict on contributory negligence in an action where plaintiff was struck by defendant's pickup truck while walking across a

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traffic lane at a shopping center. Although defendant argues that plaintiff was contributorily negligent because the "inescapable conclusion is that either [plaintiff] did not look at all while crossing the roadway, or despite seeing a pickup truck traveling towards her, she continued to walk towards it without taking any action to avoid the collision," defendant's argument assumes that plaintiff would have seen defendant's vehicle had she looked. That assumption cannot be made on the evidence in this case.

Am Jur 2d, Automobiles and Highway Traffic § 422.

Appeal by plaintiff from judgment entered 29 May 1992 in Rockingham County Superior Court by Judge W. Steven Allen. Heard in the Court of Appeals 2 September 1993.

Donaldson & Horsley, P.A., by William F. Horsley, for plaintiff-appellant.

Smith Helms Mulliss & Moore, by James W. Barkley, for defendant-appellee.

Henson Henson Bayliss & Sue, by Gary K. Sue, for unnamed defendant Allstate Insurance Company.

GREENE, Judge.

Joan Corns (plaintiff) appeals from a verdict entered 29 May 1992 after a jury trial in her negligence action against Harvey Jess Hall (defendant).

The evidence shows that on 20 May 1989, plaintiff was struck by defendant's pickup truck as she and her husband left the Food Lion grocery store in the Summerfield Shopping Center in Summerfield. The Summerfield Shopping Center is a typical "strip" shopping center, with the stores in a single row facing a large parking lot. Between the stores and the parking lot is a paved area approximately thirty feet wide. For a person to get from the store to the parking lot, they must cross this area. The thirty-foot wide area consists of a ten-foot wide parcel pick up lane which is immediately in front of the store, and a twenty-foot wide traffic lane which is bordered on one side by the parcel pick up lane and on the other by the parking lot. The twenty-foot wide traffic lane is used by vehicular traffic to travel to and from the roads leading into the shopping center.

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When plaintiff and her husband exited the Food Lion grocery store, plaintiff's husband was ahead of her. Plaintiff's husband crossed the twenty-foot wide traffic lane, and turned to his left to cross the parking lot aisle to where his car was parked. As he turned, he stopped to allow defendant's pickup truck, which was headed toward the twenty-foot wide traffic lane, to pass. As plaintiff's husband crossed the parking lot aisle, he looked back and saw his wife lying on the pavement just south of the middle of the twenty-foot wide traffic lane after having been struck by defendant's vehicle. Plaintiff's husband did not see the collision between defendant's truck and his wife. Plaintiff herself does not recall anything after leaving the grocery store.

Defendant testified that he did not see plaintiff until his truck hit her, that he was travelling about five miles per hour, and that he had travelled five to twelve yards on the twenty-foot wide traffic lane before colliding with plaintiff.

At trial, the court instructed the jury as to N.C. Gen. Stat. § 20-174(a) which requires that any pedestrian crossing a roadway at any point other than a marked crosswalk or unmarked crosswalk at an intersection yield the right-of-way to all vehicles upon the roadway. Plaintiff contends that this instruction was error because the area where this accident occurred was not a roadway within the meaning of Section 20-174(a). Plaintiff also assigns as error the trial court's refusal to instruct the jury on the issue of comparative fault and the trial court's denial of plaintiff's motion to set aside the verdict and award a new trial on the issue of plaintiff's contributory negligence. Defendant cross-assigns as error the trial court's refusal to enter a directed verdict at the close of plaintiff's evidence and at the close of all evidence on the grounds that plaintiff was contributorily negligent as a matter of law.

The issues presented are: (I) whether the area where the accident occurred is a roadway within the meaning of N.C.G.S. § 20-174(a), or a public vehicular area within the meaning of N.C.G.S. § 20-4.01(32); (II) if the area in question is a public vehicular area, what duty plaintiff had in regard to defendant's vehicle while crossing the public vehicular area; (III) whether the trial court properly refused to submit the issue of comparative fault to the jury; and (IV) whether plaintiff was contributorily negligent as a matter of law, entitling defendant to a directed verdict.

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[112 N.C. App. 232 (1993)]

I

[1] A public vehicular area is defined in N.C. Gen. Stat. § 20-4.01(32) as:

Any area within the State of North Carolina that is generally open to and used by the public for vehicular traffic, including by way of illustration and not limitation any drive, driveway, road, roadway, street, alley, or parking lot upon the grounds and premises of:

. . .

- b. Any service station, drive-in theater, supermarket, store, restaurant, or office building, or any other business, residential, or municipal establishment providing parking space for customers, patrons, or the public; . . .

N.C.G.S. § 20-4.01(32) (1989).

A "roadway" is defined in Section 20-4.01(38) as "[t]hat portion of a highway improved, designed, or ordinarily used for vehicular travel, exclusive of the shoulder." N.C.G.S. § 20-4.01(38) (1989). Section 20-4.01(13) defines a "highway" as "[t]he entire width between property or right-of-way lines of every way or place of whatever nature, *when any part thereof is open to the use of the public as a matter of right* for the purposes of vehicular travel." N.C.G.S. § 20-4.01(13) (1989) (emphasis added).

We agree with plaintiff that the area where this accident occurred is a public vehicular area and not a roadway. The accident occurred in the traffic lane of a parking lot generally open to and used by the public for vehicular traffic upon the premises of a business establishment which provides parking space for its customers. Although the lot was held open for use by the public, there is no evidence in this record that the general public has a legally enforceable right to use the lot. Because the parking lot is not open to the use of the general public as a matter of legal right, the lot is not a highway as defined in Section 20-4.01(13) and therefore cannot be a roadway.

II

[2] We have found no statute or North Carolina case which specifically describes the duty of care required of a pedestrian crossing a public vehicular area. We therefore apply common law

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principles to the facts of this case. Under the common law, pedestrians have a duty to maintain a lookout when crossing an area where vehicles travel and a duty to exercise reasonable care for their own safety. See 7A Am. Jur. 2d *Automobiles and Highway Traffic* §§ 463, 480 (1980). Likewise, a motorist operating a vehicle in a public vehicular area has a duty to maintain a lookout and to use the care which a reasonable man would use in like circumstances to avoid injury to another. See 7A Am. Jur. 2d *Automobiles and Highway Traffic* §§ 463, 479 (1980); see also *McCall v. Dixie Cartage & Warehousing Inc.*, 272 N.C. 190, 194, 158 S.E.2d 72, 75 (1967) (driver of tractor-trailer required to exercise reasonable care in operating vehicle in loading ramp area of foundry).

The trial court instructed the jury that plaintiff was required to yield the right-of-way to defendant under Section 20-174(a). N.C.G.S. § 20-174(a) (1989). Section 20-174(a), however, is inapplicable to this case because plaintiff was crossing a public vehicular area rather than a roadway. The trial court therefore erred by imposing on plaintiff a duty to yield the right-of-way and by allowing the jury to evaluate plaintiff's conduct using an improper standard of care.

III

[3] The doctrine of contributory negligence has been followed in this State since 1869. *Morrison v. Cornelius*, 63 N.C. 346 (1869). Comparative fault is not the law of this State. The trial court therefore properly refused to submit the issue of comparative fault to the jury, and properly refused to instruct the jury on comparative fault.

Plaintiff urges this Court to abandon the doctrine of contributory negligence and to adopt the doctrine of comparative fault. It is beyond this Court's authority to do so. See *Cannon v. Miller*, 313 N.C. 324, 327 S.E.2d 888 (1985). The doctrine of contributory negligence is part of the law of this State and will remain so until the General Assembly or the Supreme Court decides otherwise.

IV

[4] To support a defendant's motion for a directed verdict on the ground of contributory negligence, the *plaintiff's* evidence must so clearly establish that the plaintiff was negligent that no other reasonable inference or conclusion could be drawn. *Wells v. Johnson*, 269 N.C. 192, 197, 152 S.E.2d 229, 232 (1967). A directed verdict

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[112 N.C. App. 238 (1993)]

may not be entered if it is necessary to rely upon the defendant's evidence to establish contributory negligence. *Id.* (citing *Donlop v. Snyder*, 234 N.C. 627, 68 S.E.2d 316 (1951)).

Defendant argues that plaintiff was contributorily negligent because the "inescapable conclusion is that either [plaintiff] did not look at all while crossing the roadway, or despite seeing a pickup truck traveling towards her, she continued to walk towards it without taking any action to avoid the collision." We disagree. Defendant's argument assumes that plaintiff would have seen defendant's vehicle had she looked, an assumption that we cannot make on the evidence in this case. The issue of contributory negligence is therefore for the jury and must be resolved upon a retrial. See *Lamm v. Bissette Realty, Inc.*, 327 N.C. 412, 418, 395 S.E.2d 112, 116 (1990) (issue of contributory negligence is usually question for the jury).

New trial.

Judges EAGLES and LEWIS concur.

SARAH CAUTHEN, PETITIONER-APPELLEE v. N.C. DEPARTMENT OF HUMAN
RESOURCES, CASHWELL CENTER, RESPONDENT-APPELLANT

No. 928SC1011

(Filed 5 October 1993)

Public Officers and Employees § 42 (NC14th)— temporary and permanent positions equalling 12½ months—tacking not allowed—petitioner not permanent State employee

Petitioner did not become a permanent State employee by virtue of tacking her six-month and three-month temporary appointments to her three and one-half month permanent position, and petitioner therefore had no right to appeal her dismissal. N.C.G.S. § 126-39.

Am Jur 2d, Civil Service § 13 et seq.

Appeal by respondent from order entered 6 July 1992 by Judge Ernest B. Fullwood in Lenoir County Superior Court. Heard in the Court of Appeals 17 September 1993.

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[112 N.C. App. 238 (1993)]

Respondent appeals from the trial court's 6 July 1992 order which reversed the State Personnel Commission's "Decision and Order" of 21 February 1992. In its 21 February 1992 "Decision and Order," the State Personnel Commission concluded as follows:

Prior to the termination of her employment with the Respondent, the Petitioner had been employed by the Respondent for the immediate 12 ½ months preceding the dismissal in three paygrade 56 positions as Health Care Technician I or Developmental Technician I. Petitioner was employed for six months in a temporary full-time appointment. Following the termination of that temporary appointment she was rehired for three months in a temporary full-time appointment and upon the termination of that temporary appointment she was hired and worked for three and one-half months in a permanent part-time position. Petitioner's conduct on March 3, 1990 constituted just cause for dismissal. The Petitioner was not a "permanent State employee" as defined in N.C.G.S. 126-39 and therefore did not have a right to appeal her dismissal from employment.

The State Personnel Commission hereby orders that Petitioner's appeal be dismissed for lack of subject matter jurisdiction.

In reversing the State Personnel Commission's decision and order, *supra*, the trial court concluded that the State Personnel Commission's decision and order was "erroneous as a matter of law" and held that petitioner was a permanent State employee. The trial court ordered that respondent reinstate petitioner, award "full back benefits," and pay attorney's fees. Respondent appeals.

Eastern North Carolina Legal Services, Inc., by Wesley Abney, for petitioner-appellee.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Diane Martin Pomper, for respondent-appellant.

EAGLES, Judge.

Respondent brings forward two assignments of error. After a careful review of the briefs, transcript, and record, we reverse.

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[112 N.C. App. 238 (1993)]

I.

In its first assignment of error, respondent argues that “[t]he trial court erred in its determination that petitioner was a permanent employee with the right to appeal her dismissal.” We agree.

In *Walker v. N.C. Dept. of Human Resources*, 100 N.C. App. 498, 502, 397 S.E.2d 350, 353-54 (1990), *disc. rev. denied*, 328 N.C. 98, 402 S.E.2d 430 (1991), this Court stated:

This court’s review of a trial court’s consideration of a final agency decision is to determine whether the trial court failed to properly apply the review standard articulated in N.C. Gen. Stat. § 150B-51. *In re Kozy*, 91 N.C. App. 342, 371 S.E.2d 778 (1988), *disc. review denied*, 323 N.C. 704, 377 S.E.2d 225 (1989). Our review is further limited to the exceptions and assignments of error set forth to the order of the superior court. *Watson v. N.C. Real Estate Commission*, 87 N.C. App. 637, 362 S.E.2d 294 (1987), *cert. denied*, 321 N.C. 746, 365 S.E.2d 296 (1988).

An agency decision may be reversed or modified by the reviewing court if the substantial rights of the petitioners may have been prejudiced because the agency’s findings, inferences, conclusions, or decisions are:

- (4) Affected by other error of law;
- (5) Unsupported by substantial evidence . . . in view of the entire record as submitted; or
- (6) Arbitrary or capricious.

N.C. Gen. Stat. § 150B-51 (b) (1985). The proper standard to be applied depends on the issues presented on appeal. If it is alleged that an agency’s decision was based on an error of law then a *de novo* review is required. *Brooks, Com’r of Labor v. Rebarco, Inc.*, 91 N.C. App. 459, 372 S.E.2d 342 (1988).
. . .

Having set out the proper standard of review, we now determine whether the trial court correctly applied it.

Permanent State employees have the right to appeal adverse decisions to the State Personnel Commission: those serving under temporary appointments do not have the right to appeal adverse decisions. G.S. 126-35(a) (effective until July 1, 1993) (“No permanent

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employee subject to the State Personnel Act shall be discharged . . . for disciplinary reasons, except for just cause. . . . The employee . . . may appeal to the State Personnel Commission. . . . The State Personnel Commission may adopt, subject to the approval of the Governor, rules that define just cause”); G.S. 126-39 (effective until July 1, 1993) (defining the term “permanent State employee”).

The trial court, in reversing the State Personnel Commission, found that petitioner was a permanent State employee. The term “permanent State employee” is defined *inter alia* as a person “in a grade 60 or lower position who has been *continuously employed* by the State of North Carolina for the immediate 12 preceding months.” G.S. 126-39(1) (effective until July 1, 1993) (emphasis added). Here, petitioner’s employment terminated and restarted twice in a 12 month period. During this time, petitioner held two separate temporary appointments: the first temporary appointment was for six months (1 March 1989 through 31 August 1989) and the second temporary appointment was for three months (1 September 1989 through 30 November 1989). The parties stipulated to the two temporary appointments and to their duration. We note that at the beginning of her first temporary appointment, petitioner received a letter from respondent (petitioner’s exhibit 1) stating that “[s]ince your appointment is temporary, you are not eligible for the benefits made available to permanent employees.” Immediately after the end of the second temporary appointment, petitioner began work in a permanent part-time position as a Developmental Technician I (Grade 56) effective 1 December 1989. She worked in this position until 15 March 1990, the date of her dismissal. Petitioner argues that she can tack her two temporary appointments so as to amount to a cumulative nine month period to be added to her three and one-half months of service in her permanent position and thereby achieve the 12 months of continuous employment necessary to be considered a permanent State employee under G.S. 126-39(1).

“Where an issue of statutory interpretation arises, the construction adopted by those who execute and administer the law in question is highly relevant.” *State v. Tew*, 326 N.C. 732, 739, 392 S.E.2d 603, 607 (1990) (citations omitted). See G.S. 126-4. We find that the State Personnel Commission’s interpretation of G.S. 126-39 is correct and that the trial court erred. Under the North Carolina Administrative Code, “[a] temporary appointment is an appointment for a limited term, normally not to exceed three to

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six months, to a permanent or temporary position. When sufficiently justified, a longer period of time may be requested; but in no case shall the temporary employment period exceed 12 consecutive months." N.C. Admin. Code title 25, 01C.0405. We note that permanent State employees receive several benefits which temporary employees are not entitled to receive. *See* N.C. Admin. Code title 25 01E.0203 (vacation leave); N.C. Admin. Code title 25, 01E.0301 (sick leave); N.C. Admin. Code title 25, 01E.0804 (military leave); N.C. Admin. Code title 25, 01E.0908 (paid holidays). When all of these provisions of the Code are considered together with G.S. 126-39 and G.S. 126-35, it is clear that temporary employees do not have the same benefits as permanent employees; indeed, under the express language used in the Code, a temporary employment period cannot "exceed 12 consecutive months." N.C. Admin. Code title 25, 01C.0405. To hold that petitioner became a permanent State employee by virtue of tacking her two temporary appointments to her three and one-half month permanent position would in effect establish a quasi-tenure system in temporary employment which neither the General Assembly nor the State Personnel Commission intended. We decline to adopt this interpretation. Accordingly, we reverse the trial court.

In its second assignment of error, respondent contends that "[t]he trial court erred in finding that there was not substantial evidence in the record to support just cause for the dismissal." Given our disposition of the first issue, *supra*, we need not address this assignment of error.

For the reasons stated, the trial court's 6 July 1992 order is reversed. We remand the cause to the trial court for entry of an order vacating that order, and entering in lieu thereof an order affirming the decision of the State Personnel Commission dismissing petitioner's appeal for lack of subject matter jurisdiction.

Reversed and remanded.

Judges ORR and GREENE concur.

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[112 N.C. App. 243 (1993)]

MICHAEL RAY GARLOCK v. GLENN HENSON AND WAYNE PHILLIPS

No. 9224DC657

(Filed 5 October 1993)

**1. Appeal and Error § 446 (NCI4th)— averment in answer—
contrary argument on appeal not permitted**

Defendant's contention that the trial court erred by concluding that the codefendants were not partners in an action seeking payment of an amount owed under a contract and damages for unfair or deceptive practices was not heard on appeal because defendant averred in his answer that no partnership existed. He could not argue to the contrary on appeal.

Am Jur 2d, Appeal and Error §§ 726-729.**2. Unfair Competition § 1 (NCI3d)— unfair and deceptive
practices—breach of contract—aggravated conduct**

The trial court did not err by awarding damages on an unfair or deceptive practices claim where plaintiff and defendants entered into a contract for the sale of plaintiff's bulldozer under which plaintiff was to receive \$7,642.40 as the balance of the purchase price when the bulldozer was sold; plaintiff's evidence showed that defendant Henson repeatedly denied the sale of the bulldozer when he knew it had been sold and supports a finding that defendant forged a bill of sale in an attempt to extinguish plaintiff's ownership interest in the bulldozer; and, through his conduct, defendant deprived plaintiff for three years of money he was unquestionably entitled to receive. Although defendant contends that plaintiff established only a breach of contract, a breach of contract may violate N.C.G.S. § 75-1.1 when accompanied by aggravating circumstances. While defendant argued that the misleading statements did not cause additional damages because plaintiff ultimately received the amount due under the contract, this was a continuous transaction rather than two distinct occurrences. It does not matter that the same set of facts also constitutes a breach of contract; plaintiff's arguments are treated as an election of damages for unfair and deceptive practices.

**Am Jur 2d, Monopolies, Restraints of Trade, and Unfair
Trade Practices § 695.**

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3. Unfair Competition § 1 (NCI3d)— unfair or deceptive practices—attorney fees—findings

The trial court correctly awarded attorney fees, and the case was remanded for award of a reasonable attorney fee for the appeal, in an unfair or deceptive practices action where defendant Henson contended that the court did not make sufficient findings to support the award, but the court found that defendant willfully committed the acts charged and that there was an unwarranted refusal to settle. Those findings are sufficient to support the award under N.C.G.S. § 75-16.1.

Am Jur 2d, Monopolies, Restraints of Trade, and Unfair Trade Practices § 711.

Appeal by defendant from judgment entered 3 March 1992 by Judge Alexander Lyerly in Watauga County District Court. Heard in the Court of Appeals 6 July 1993.

Plaintiff and defendants apparently entered into two separate contracts on 14 September 1987—one for the sale of plaintiff's dump truck, lowboy trailer, loader, and backhoe, and the other for the sale of plaintiff's bulldozer. A bill of sale showed that defendants paid plaintiff in full for the dump truck, trailer, loader, and backhoe. In a separate writing however, defendants agreed to assume the loan on the bulldozer and to sell it. Pursuant to this writing, plaintiff was to receive \$7,642.40 as the balance of the purchase price when the bulldozer was sold. There is disagreement over whether or not Phillips knew about the obligation to pay plaintiff the additional sum after the sale of the bulldozer and whether or not the contract contained that obligation when Phillips signed it. Henson, however, acknowledged the obligation.

On 26 September 1988, defendants sold the bulldozer but did not tell plaintiff. Before the sale, Phillips learned of the contractual provision relating to the additional sum, but he believed Henson alone owed the money to plaintiff. Plaintiff asked Phillips twice if the bulldozer was sold, and Phillips told plaintiff to talk to Henson about it. Plaintiff called Henson practically every month for three years to ask him if the bulldozer was sold. Henson continually misled plaintiff after the bulldozer was sold and thereby avoided paying the additional sum due under the contract.

Finally, in September 1991, plaintiff saw the bulldozer on a car lot in another county and discovered that Phillips and Henson

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had sold it. Plaintiff called Henson again and made a tape recording of him denying that the bulldozer had been sold. Subsequently, plaintiff filed this action seeking payment of the amount owed to him under the contract and damages for unfair and deceptive trade practices.

Plaintiff alleged that defendants were partners, but both defendants denied the existence of a partnership. At the close of plaintiff's evidence, the court directed a verdict for Phillips on the unfair and deceptive trade practices claim and reserved ruling on the partnership issue. The court ultimately concluded that defendants were not partners and entered judgment for Phillips. The court concluded that Henson was liable to plaintiff for the remainder of the contract price and for unfair and deceptive trade practices. The court then trebled plaintiff's damages and awarded attorney fees. Defendant Henson appeals.

Chester E. Whittle, Jr. for plaintiff appellee.

Jan W. Lamm for defendant appellee Phillips.

Steven E. Lacy for defendant appellant Henson.

ARNOLD, Chief Judge.

[1] In his first argument, defendant contends that the trial court erred in concluding that he and defendant Phillips were not partners. We do not address this argument because defendant averred in his answer that no partnership existed and cannot now argue to the contrary. This portion of the trial court's judgment will, therefore, not be disturbed.

[2] Defendant next argues that the trial court erred in determining that defendant's conduct constituted unfair and deceptive trade practices in violation of N.C. Gen. Stat. § 75-1.1 (1988). Defendant contends that plaintiff established only a breach of contract, and a mere breach of contract cannot be a violation of G.S. § 75-1.1. In *Branch Banking and Trust Co. v. Thompson*, 107 N.C. App. 53, 418 S.E.2d 694, *disc. review denied*, 332 N.C. 482, 421 S.E.2d 350 (1992), however, this Court indicated that when accompanied by aggravating circumstances a breach of contract may violate G.S. § 75-1.1. *Id.* at 62, 418 S.E.2d at 700. *See also Bartolomeo v. S.B. Thomas, Inc.*, 889 F.2d 530, 535 (4th Cir. 1989) (recognizing that substantial aggravating circumstances would justify the treble

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damages recovery under G.S. § 75-1.1 and intimating that deception surrounding the breach would suffice).

Plaintiff's evidence showed that defendant repeatedly denied the sale of the bulldozer when he knew it had been sold. In addition, the evidence supports a finding that defendant forged a bill of sale in an attempt to extinguish plaintiff's ownership interest in the bulldozer. Through his conduct, defendant deprived plaintiff for three years of money he was unquestionably entitled to receive. Defendant's conduct in this matter was sufficiently aggravating to support the trial court's conclusion that defendant violated G.S. § 75-1.1. *See Foley v. L & L Int'l, Inc.*, 88 N.C. App. 710, 364 S.E.2d 733 (1988) (when defendant contracted to acquire a car and continually misled plaintiff into believing the car was on its way when it had not even been ordered, facts supported claims for breach of contract and unfair and deceptive trade practices).

Defendant further argues that plaintiff did not show he was injured by defendant's deception, and therefore no claim exists under G.S. § 75-1.1. The basis of defendant's argument is that because plaintiff ultimately received the amount due under the contract, defendant's misleading statements did not cause additional damages but only delayed recovery. On that ground, defendant argues that plaintiff may not maintain an action for unfair and deceptive trade practices because plaintiff suffered no actual injury from the deceptive conduct. We disagree with defendant's perception of this case.

Defendant attempts to divide this case into two distinct occurrences, as if the breach of contract is separate from the conduct which aggravated the breach, when in fact we have a continuous transaction that amounts to unfair and deceptive trade practices. It does not matter that the same set of facts also constitutes a breach of contract. "Where the same course of conduct gives rise to a traditionally recognized cause of action, as, for example, an action for breach of contract, and as well gives rise to a cause of action for violation of G.S. 75-1.1, damages may be recovered either for the breach of contract, or for violation of G.S. 75-1.1" *Marshall v. Miller*, 47 N.C. App. 530, 542, 268 S.E.2d 97, 103 (1980), *modified and aff'd*, 302 N.C. 539, 276 S.E.2d 397 (1981). *See also Canady v. Mann*, 107 N.C. App. 252, 419 S.E.2d 597 (1992), *disc. review improvidently allowed*, 333 N.C. 569, 429 S.E.2d 348 (1993). We treat plaintiff's arguments as an election of damages

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for unfair and deceptive trade practices and affirm the portion of the trial court's order awarding damages on that claim.

[3] Defendant finally argues that the trial court did not make sufficient findings of fact to support the award of attorney fees. We disagree.

N.C. Gen. Stat. § 75-16.1 provides that the trial judge may allow a reasonable attorney fee to the prevailing party if the judge finds that "[t]he party charged with the violation has willfully engaged in the act or practice, and there was an unwarranted refusal by such party to fully resolve the matter which constitutes the basis of such suit." The trial court did find that defendant willfully committed the acts charged and that there was an unwarranted refusal to settle. These findings are sufficient to support the award under G.S. § 75-16.1. Contrary to defendant's argument, there is ample evidence to support the finding that defendant's failure to pay the claim was unwarranted. We therefore affirm the award of attorney fees.

Because plaintiff is entitled to attorney fees for time spent protecting his judgment, *Cotton v. Stanley*, 94 N.C. App. 367, 370, 380 S.E.2d 419, 422 (1989); *City Fin. Co. v. Boykin*, 86 N.C. App. 446, 450, 358 S.E.2d 83, 85 (1987), we remand this case for a determination and award of a reasonable attorney fee for time spent defending this appeal.

Affirmed in part and remanded in part.

Judges COZORT and MARTIN concur.

IN RE DIXON

[112 N.C. App. 248 (1993)]

IN THE MATTER OF: BABY BOY DIXON

No. 9226DC981

(Filed 5 October 1993)

Parent and Child § 111 (NCI4th)— petition to terminate parental rights—nonresident father—paternity not established, no legitimation, no financial support—minimum contacts not required

The trial court erred by dismissing a termination of parental rights petition against a father who had insufficient minimum contacts with North Carolina to satisfy due process guarantees. Because the facts in this case relate to the termination of the parental rights of a father of a child born out of wedlock who has not acknowledged paternity, legitimated his child, or supported the child and mother in any way, the case is not controlled by *In re Finnican*, 104 N.C. App. 157 and *In re Trueman*, 99 N.C. App. 579. A father's constitutional right to due process of law does not "spring full-blown from the biological connection between parent and child" but instead arises only where the father demonstrates a commitment to the responsibilities of parenthood. "Traditional notions of fair play and substantial justice" are not offended by permitting the petitioner to proceed with terminating the father's parental rights in the absence of his minimum contacts with this State; notice by publication was given. N.C.G.S. § 7A-289.27.

Am Jur 2d, Parent and Child §§ 34, 35.**Validity of state statute providing for termination of parental rights. 22 ALR4th 774.**

Appeal by petitioner from order entered 4 August 1992 in Mecklenburg County District Court by Judge Resa L. Harris. Heard in the Court of Appeals 15 September 1993.

Richard A. Lucey for petitioner-appellant Catholic Social Services of the Diocese of Charlotte, N.C., Inc.

Donald S. Gillespie, Jr., Attorney-Guardian ad Litem for the juvenile.

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[112 N.C. App. 248 (1993)]

GREENE, Judge.

Catholic Social Services of the Diocese of Charlotte, N.C., Inc. (petitioner) appeals from an order entered 4 August 1992, dismissing its petition to terminate the parental rights of Damon Edwards (respondent) for lack of personal jurisdiction.

The record reveals that Dionne DeShawn Dixon (Dixon) was a student at Hampton University in Hampton, Virginia in the fall of 1990 when she met the respondent, an employee in the cafeteria at the Hampton University Student Union. The respondent and Dixon had only one date in either October or November of 1990. On that date, they engaged in sexual relations which resulted in Dixon's pregnancy. After learning of her pregnancy, Dixon inquired of respondent at the Student Union and was advised that he was no longer employed there.

Subsequently, on 3 August 1991, Dixon gave birth to a baby boy in Winston-Salem, Forsyth County, North Carolina. On 13 August 1991, Dixon released her parental rights and surrendered the child for adoption pursuant to N.C. Gen. Stat. § 48-9(a)(1) to petitioner, a private child-placing agency licensed by the Department of Human Resources in accordance with Chapter 48. Baby Boy Dixon was placed at risk in an adoptive home under the supervision of the Department of Social Services of Duplin County, North Carolina on 31 October 1991.

In August and September of 1991, petitioner made repeated attempts to locate respondent through certified letters and phone calls to respondent's last known address, Hampton University, Hampton directory assistance, respondent's former employer, the Department of Motor Vehicles, and the Hampton Police Department. All attempts proved futile and petitioner was unable to secure respondent's release of the child. On 14 November 1991, petitioner filed a petition in Mecklenburg County District Court seeking termination of respondent's parental rights. Service was unsuccessfully attempted at respondent's last known address. Notice of service of process by publication was obtained on the respondent through publication in The Hampton Daily Press. Respondent did not file an answer or response within the 40-day period as required by N.C. Gen. Stat. § 1A-1, Rule 4(j1) (1990).

On 18 May 1992, a guardian ad litem was appointed for Baby Boy Dixon. The guardian ad litem submitted a report in favor

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of terminating respondent's parental rights as in the best interests of the child. Although finding sufficient grounds for terminating respondent's parental rights pursuant to N.C. Gen. Stat. § 7A-289.32(6) and finding termination in the best interests of the child, the trial court dismissed the petition because "[t]his Court is bound to follow . . . the holding in In Re Finnican, 104 NC [App.] 157, 408 SE2d 742 (1991), [cert. den[ied]], 330 NC 612 (1992) . . . that the Court may not grant the termination of parental rights as to the father who has insufficient minimum contacts with the State of North Carolina to satisfy due process guarantees."

The issue presented is whether personal jurisdiction requires minimum contacts with the State of North Carolina in a petition to terminate the parental rights of a non-resident father of a child born out of wedlock who has failed to establish paternity, legitimate his child, or provide substantial financial support or care to the child and mother.

Generally, whether a trial court has personal jurisdiction over a non-resident defendant "depends upon whether (1) our legislature has authorized our courts to exercise personal jurisdiction over the defendant in the action, (2) the plaintiff has properly notified the defendant of the action, and (3) the defendant has 'minimum contacts' with this State." *Harris v. Harris*, 104 N.C. App. 574, 577, 410 S.E.2d 527, 529 (1991). This Court has applied these general rules in the context of a termination of parental rights proceeding filed against the father of a child born in wedlock, holding that minimum contacts was required. *In re Finnican*, 104 N.C. App. 157, 161-62, 408 S.E.2d 742, 745 (1991), *cert. denied*, 330 N.C. 612, 413 S.E.2d 800, *overruled on different grounds by Bryson v. Sullivan*, 330 N.C. 644, 663, 412 S.E.2d 327, 337 (1992); *In re Trueman*, 99 N.C. App. 579, 581, 393 S.E.2d 569, 570 (1990).

The petitioner argues that because the facts in this case relate to the termination of the parental rights of a father of a child born out of wedlock who has not acknowledged paternity, legitimated his child, or supported the child and mother in any way, we are not controlled by *In re Finnican* and *In re Trueman*. We agree.

The requirement of minimum contacts for personal jurisdiction protects a person's due process rights by insuring that maintenance of a suit does not "offend traditional notions of fair play and substantial justice." *International Shoe Co. v. Washington*, 326 U.S. 310,

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316, 90 L. Ed. 95, 102 (1945). In some circumstances, however, "fair play and substantial justice" do not necessitate minimum contacts with the forum state or notice to the party. For example, the trial courts of this state may, consistent with the due process clause, "enter a child custody decree in the absence of 'minimum contacts' by the non-resident defendant." *Harris*, 104 N.C. App. at 579, 410 S.E.2d at 530. For another example, the father of a child born out of wedlock does not have, under the constitution, an absolute right to notice and an opportunity to be heard before his child can be adopted. *Lehr v. Robertson*, 463 U.S. 248, 77 L. Ed. 2d 614 (1983). As stated by the United States Supreme Court:

The significance of the biological connection is that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring. If he grasps that opportunity and accepts some measure of responsibility for the child's future, he may enjoy the blessings of the parent-child relationship and make uniquely valuable contributions to the child's development. If he fails to do so, the Federal Constitution will not automatically compel a State to listen to his opinion of where the child's best interests lie.

Id. at 262, 77 L. Ed. 2d at 627. Thus, a father's constitutional right to due process of law does not "spring full-blown from the biological connection between parent and child" but instead arises only where the father demonstrates a commitment to the responsibilities of parenthood. *Id.* at 260, 77 L. Ed. 2d at 626.

The North Carolina Legislature has provided a method for a putative father to demonstrate his commitment to the child, and it requires the father to take steps to either establish paternity, legitimate the child, or provide "substantial financial support or consistent care with respect to the child and mother." N.C.G.S. § 7A-289.32(6) (Supp. 1992). In this case, the father, having the responsibility to "discover the birth of [his] . . . illegitimate [child]," *In re Clark*, 95 N.C. App. 1, 9, 381 S.E.2d 835, 840 (1989), *rev'd on other grounds*, 327 N.C. 61, 393 S.E.2d 791 (1990), failed, although he had ample opportunity to do so, to take any of the statutory steps to demonstrate his commitment to the child. We need not decide whether a petition filed less than two and a half months after the child is born provides a putative father with an "opportunity," as that term is used in *Lehr*, to demonstrate his commitment to the child. See *Raquel Marie X*, 76 N.Y.2d 387, 405, 559

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N.E.2d 418, 426, *cert. denied, sub nom. Robert C. v. Miguel T.*, 498 U.S. 984, 112 L. Ed. 2d 528 (1990) (holding that father of new-born child is entitled to an "opportunity" to demonstrate paternal interest).

In this case, "traditional notions of fair play and substantial justice" are not offended by permitting the petitioner to proceed with terminating the father's parental rights in the absence of his minimum contacts with this State, and the order of the trial court must be reversed. We do note, without deciding whether it is constitutionally required, that the legislature has provided that any parent, including a putative father, is entitled to notice of the termination proceeding, N.C.G.S. § 7A-289.27, and that notice by publication was given in this case.

Reversed and remanded.

Judges EAGLES and ORR concur.

STATE OF NORTH CAROLINA v. CLARENCE RICHARDSON

No. 9226SC958

(Filed 5 October 1993)

1. Homicide § 648 (NCI4th) — closing arguments — statement by court concerning self-defense — no prejudice

There was no prejudice in a prosecution for second-degree murder where, when the prosecutor repeated in closing arguments defense counsel's analogy comparing the right to defend a place of business to the right to defend one's home, the judge interrupted him, saying, "Don't use home. The rules for the home, for defense of home, are different from those of other premises." The judge's eventual charge to the jury that a person may stand his ground and has no duty to retreat from his place of business cleared up any confusion, real or inferred, allegedly caused by his interruption of the prosecutor.

Am Jur 2d, Homicide § 519 et seq.

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[112 N.C. App. 252 (1993)]

2. Homicide § 596 (NCI4th)— second-degree murder—self-defense—instruction on belief that killing victim necessary—erroneous

The trial court erred in a second-degree murder prosecution when instructing the jury on perfect self-defense by stating that it must have appeared to defendant and he believed it necessary to kill the victim. Submitting that element of perfect self-defense as stated reads into the defense an intent to kill which is not part of second-degree murder, and renders impermissibly easier the State's burden of disproving the first element or the second element of perfect self-defense since the circumstances that would justify the reasonableness of an intent to kill in self-defense would be graver than those justifying the reasonableness of an intentional killing, as that phrase is defined. Submitting the defense in terms of defendant's belief that it was "necessary to shoot [or use deadly force against] the deceased in order to save himself from death or great bodily harm," will rectify the problem and will render sensible the fourth element, allowing the jury to determine whether defendant's killing in self-defense constituted excessive force.

Am Jur 2d, Homicide § 519 et seq.

Appeal by defendant from judgment entered 5 March 1992 by Judge Robert D. Lewis in Mecklenburg County Superior Court. Heard in the Court of Appeals 31 August 1993.

On 5 August 1991, defendant was indicted by the grand jury for two counts of murder, pursuant to N.C. Gen. Stat. § 14-17 (Supp. 1992), and one count of assault with a deadly weapon with intent to kill inflicting serious injury, pursuant to N.C. Gen. Stat. § 14-32(a) (1986). The jury found defendant guilty of two counts of second degree murder and one count of assault with a deadly weapon with intent to kill inflicting serious injury. From the convictions of second degree murder, defendant appeals.

Attorney General Lacy H. Thornburg, by Associate Attorney General John G. Barnwell, for the State.

Assistant Public Defender Marc D. Towler for defendant-appellant.

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[112 N.C. App. 252 (1993)]

McCRODDEN, Judge.

On appeal, defendant raises two issues: (I) whether the trial court committed prejudicial error when it interrupted the prosecutor's closing argument to comment that the rules for defending the home are different from the rules for other premises, and (II) whether the trial court erred in instructing the jury that it could find that the defendant acted in self-defense only if he reasonably believed it necessary to *kill*, as opposed to *shoot*, in self-defense.

The evidence at trial showed that shortly after midnight on 18 July 1991, defendant, who was the acting manager of the Leather and Lace Club, shot three brothers, Brian, Barry, and James Kirkpatrick. James Kirkpatrick was hospitalized for ninety days and survived bullet wounds to his elbow, hip, and abdomen, but Brian and Barry Kirkpatrick died on the sidewalk in front of the Leather and Lace.

On 17 July 1991, after an evening of drinking beer and whiskeys and Coke, the three brothers arrived at the Leather and Lace but were denied admission by an employee, Dick Pincelli, because he believed that James Kirkpatrick was intoxicated. (The blood alcohol content of James Kirkpatrick, who was 6'6" tall and weighed 305 pounds, was equivalent to a breathalyzer reading of .21. In addition to his alcohol consumption, James Kirkpatrick, a Doctor of Dental Surgery, had also taken a Percodan capsule, a narcotic commonly prescribed for dental pain, around 5:30 p.m. that same day. Brian Kirkpatrick was 5'11" tall and weighed 216 pounds, and his blood alcohol content was the equivalent of .14 on the breathalyzer. Barry Kirkpatrick was six feet tall and weighed 182 pounds, and his blood alcohol content was the equivalent of .19 on the breathalyzer.)

After Pincelli denied the three brothers admittance to the club, the men exchanged profanities. James Kirkpatrick pushed the admissions window in, and Pincelli told the brothers that they would have to leave and warned that the police had been called.

Witnesses' accounts of the confrontation between defendant and the three brothers differ. James Kirkpatrick testified as follows: after being informed that the police had been called, the brothers left the club's foyer; as they were returning to their cars, they heard a yell from the door; the brothers turned toward the door,

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and Barry Kirkpatrick reached the door and leaned on it; James Kirkpatrick grabbed him, saying, "Come on, Barry. It's not worth it." Then four shots were fired.

Defendant testified that at about midnight he was taking inventory in a back room of the Leather and Lace when he heard a commotion and someone yelling that the bartender needed him. As defendant approached the foyer, he partially pushed the door open toward the foyer, and a large arm shoved the door back into his face. Defendant returned to his office and obtained a .45 calibre pistol from the desk drawer. The bartender advised defendant that 911 had been called and that the brothers were outside the glass door. Defendant testified that the following events happened in five to ten seconds: as defendant approached the glass door, he saw Barry Kirkpatrick leaning against the door and Brian and James Kirkpatrick arguing with each other about six feet from Barry. After defendant told the brothers that they needed to leave, Barry replied that he would "kick [defendant's] ass;" Brian Kirkpatrick began fighting with Danny Thompson, a customer. The glass door slammed into defendant, pinning his right arm, and James Kirkpatrick reached through the opening, grabbed defendant, and said, "You f--- with us, we will kill you." Defendant then shot the three brothers.

Defendant went back inside the Leather and Lace to wait for the police. He placed the gun on the bar. When the police arrived, he told them, "I did it, they was all over me." Defendant, who was 6'2" tall and weighed 180 pounds, testified that at the time he fired the shots he was scared because James Kirkpatrick, who had threatened to kill him, outweighed him by 120 to 130 pounds.

I.

[1] Defendant first contends that the trial court erred by stating during the prosecutor's closing arguments that the rules for defending the home are different from those for defending other premises. The record reflects that, during his closing argument, counsel for the defendant analogized the right to defend a person's place of business to the right to defend one's home. When the prosecutor used the same analogy during his closing argument, the judge interrupted him, stating: "Don't use the home. The rules for the home, for defense of the home, are different from those of other premises."

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Defendant argues that this statement was improper and prejudicial because it was an incorrect statement of law as applied to the absence of a duty to retreat, and because it implied that a person has a greater right to defend himself in his home than in his place of business. We find no error.

Although counsel is allowed wide latitude in closing arguments, the trial judge may exercise his discretion in limiting those arguments. *State v. Whiteside*, 325 N.C. 389, 398, 383 S.E.2d 911, 916 (1989). In his argument, defendant infers from the trial court's interruption of the prosecutor that there are different rules concerning the duty to retreat for defense of one's home and defense of one's business. Specifically, defendant asserts that the judge misstated the law regarding the duty to retreat since a person who is assailed, without any fault of his own, has no duty to retreat either from his home or his place of business. *State v. Lee*, 258 N.C. 44, 127 S.E.2d 774 (1962). Our review of the record, however, shows that the judge never stated that an assailed person has a duty to retreat from his place of business, and we decline to infer that his comment indicated that there are different rules regarding the duty to retreat in the home and in the place of business.

The judge's eventual charge to the jury that a person may stand his ground and has no duty to retreat from his place of business cleared up any confusion, real or inferred, allegedly caused by his interruption of the prosecutor. Hence, we find no prejudice to the defendant, and we overrule this assignment of error.

II.

[2] We now turn to defendant's contention that the trial court gave an erroneous instruction on self-defense to the jury. Specifically, defendant argues that the trial court should have modified the jury instruction on self-defense to state that it appeared to the defendant and he reasonably believed it to be necessary to "shoot the victim", rather than "kill the victim", to save himself from death or great bodily harm. Defendant argues that the jury instruction as presented by the trial court deprived him of imperfect self-defense.

The elements which constitute perfect self-defense are:

(1) [I]t appeared to defendant and he believed it to be necessary to kill the deceased in order to save himself from death or great bodily harm; and

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(2) defendant's belief was reasonable in that the circumstances as they appeared to him at that time were sufficient to create such a belief in the mind of a person of ordinary firmness; and

(3) defendant was not the aggressor in bringing on the affray, i.e., he did not aggressively and willingly enter into the fight without legal excuse or provocation; and

(4) defendant did not use excessive force, i.e., did not use more force than was necessary or reasonably appeared to him to be necessary under the circumstances to protect himself from death or great bodily harm.

State v. McAvoy, 331 N.C. 583, 595, 417 S.E.2d 489, 497 (1992). Under the law of perfect self-defense, a defendant is excused altogether if, at the time of the killing, all of the four elements existed. *Id.* at 595-96, 417 S.E.2d at 497. On the other hand, a defendant is guilty of voluntary manslaughter pursuant to the principle of imperfect self-defense if the State fails to disprove elements (1) and (2), but disproves either element (3) or element (4). However, if the State disproves either element (1) or element (2), the correct verdict is murder, not voluntary manslaughter. *Id.* at 596, 417 S.E.2d at 497.

The Supreme Court in *McAvoy* resolved two conflicting lines of precedent about the appropriate homicide verdict for a killing based upon an honest but unreasonable belief in the need to kill in self-defense, and held that an honest but unreasonable belief that deadly force was necessary will result in a verdict of murder rather than manslaughter. *Id.* at 601, 417 S.E.2d at 500. Defendant asserts, however, that *McAvoy* did not resolve the logical inconsistency between the verdict of murder when the State disproves element (1) or element (2) and the verdict of voluntary manslaughter when the State disproves element (4). According to defendant's analysis, a killing based upon an unreasonable belief in the need to kill in self-defense is identical to the use of excessive force, since a person cannot kill excessively. Thus, it is inconsistent to instruct the jury to convict defendant of murder if defendant's belief was unreasonable, but to instruct the jury to convict defendant of manslaughter if defendant's belief was reasonable but he used excessive force.

Defendant suggests that this Court should resolve the inconsistency by modifying the language in elements (1) and (2) to state

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that the defendant reasonably believed it to be necessary to use "deadly force" or to "shoot" the victim to save himself from death or great bodily injury. Therefore, according to this argument, a defendant would be guilty of at least voluntary manslaughter if he had the intent to wound but not to kill an aggressor, but used excessive force resulting in the death of the aggressor. For somewhat different reasons, we believe defendant's argument has merit.

In *State v. Ray*, the Supreme Court noted:

Neither second degree murder nor voluntary manslaughter has as an essential element an intent to kill. In connection with these two offenses, the phrase "intentional killing" refers not to the presence of a specific intent to kill, but rather to the fact that the *act* which resulted in death is intentionally committed and is an act of assault which in itself amounts to a felony or is likely to cause death or great bodily injury.

299 N.C. 151, 158, 261 S.E.2d 789, 794 (1980). Submitting to the jury the first element of perfect self-defense as quoted, *i.e.*, that "it appeared to the defendant and he believed it to be necessary to *kill* the deceased in order to save himself from death or great bodily harm," reads into this defense an element (intent to kill) that is not part of second degree murder. That submission also renders impermissibly easier the State's burden of disproving the first element or the second element of perfect self-defense since the circumstances that would justify the reasonableness of an intent to kill in self-defense would be graver than those justifying the reasonableness of an intentional killing, as that phrase is defined.

It is significant to our decision that the trial court did not submit to the jury a charge of first degree murder. Since we are not confronted with a situation in which the jury had to decide if the defendant were guilty of first or second degree murder, we do not determine the proper instruction for perfect self-defense under those circumstances. We are aware, however, that *State v. Watson* (No. 359A91), pending now before the Supreme Court, raises the question of whether the instruction on self-defense should state *deadly force* rather than *kill* in a case in which the judge submitted to the jury the charges of first and second degree murder and manslaughter.

In summary, we conclude that the trial court erred in instructing the jury on perfect self-defense as it relates to second degree

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murder. Submitting the defense in terms of defendant's belief that it was "necessary to shoot [or use deadly force against] the deceased in order to save himself from death or great bodily harm," will rectify the problem. It will also render sensible the fourth element, allowing the jury to determine whether defendant's killing in self-defense constituted excessive force.

Based upon the foregoing, we must reverse the trial court's action and order a new trial.

New trial.

Judges WELLS and ORR concur.

SHANTA' L. RAY AND GEORGE STANLEY ROYAL, JR., BY HIS GUARDIAN
AD LITEM, RICHARD M. PRICE AND SAUDRA BARBOUR v. ATLANTIC
CASUALTY INSURANCE COMPANY, A NORTH CAROLINA CORPORATION

No. 9211SC1013

(Filed 5 October 1993)

Insurance § 528 (NCI4th)— underinsured coverage—multiple parties—tortfeasor's coverage less than UIM coverage after settlement with one party

The tortfeasor's vehicle was not an underinsured vehicle and the trial court correctly entered summary judgment for defendant Atlantic Casualty Insurance where plaintiffs were injured in a head-on collision with a vehicle insured by Aetna; defendant Atlantic Casualty insured plaintiff Ray, who owned the car; the tortfeasor's policy with Aetna provided limits of liability of \$100,000 per person for bodily injury, \$300,000 per occurrence for bodily injury, and \$50,000 for property damage; Aetna settled the claim of the passenger in the tortfeasor's vehicle, leaving \$202,000 of the per occurrence liability coverage available to pay plaintiffs; plaintiff Ray's policy with defendant Atlantic Casualty provided underinsured policy limits of \$100,000 per person and \$300,000 per accident; and plaintiffs Ray and Royal sought a declaratory judgment that Atlantic Casualty's policy provides for underinsured motorist coverage for Ray and Royal in the amount of \$98,000. At the time

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of the accident, the tortfeasor's liability coverage was identical to Ray's UIM coverage and the tortfeasor's vehicle was not an underinsured vehicle. Any payments made after the date of the accident which reduced the insurance available to plaintiffs are not relevant to this inquiry.

Am Jur 2d, Automobile Insurance § 322.

Uninsured and underinsured motorist coverage: recoverability, under uninsured or underinsured motorist coverage, of deficiencies in compensation afforded injured party by tortfeasor's liability coverage. 24 ALR4th 13.

Appeal by plaintiffs from order entered 21 August 1992 in Johnston County Superior Court by Judge Knox V. Jenkins. Heard in the Court of Appeals 17 September 1993.

Allen R. Tew for plaintiff-appellants.

Wallace, Morris, Barwick & Rochelle, P.A., by P.C. Barwick, Jr. and Martha B. Beam, for defendant-appellee.

GREENE, Judge.

Shanta' L. Ray (Ray), George Stanley Royal, Jr. (Royal), and Saudra Barbour (Barbour) appeal from an order entered 21 August 1992, granting Atlantic Casualty Insurance Company's (Atlantic Casualty) motion for summary judgment because "there is no underinsured motorist coverage as a matter of law."

The parties stipulated to these facts: On 16 September 1988, Ray was driving her 1986 Dodge in Johnston County, North Carolina. Royal, Ray's one-year-old son, and Barbour were occupants in Ray's Dodge. Around 7:00 p.m., they were involved in a head-on collision with a 1976 Chevrolet Camaro owned and operated by Ronnie Rufus Pollard, Jr. (tortfeasor). Randy Hall (Hall) was an occupant in the Camaro which allegedly crossed the centerline and hit Ray's car head-on in its own lane of travel.

At the time of the collision, Aetna Insurance Company (Aetna) insured the tortfeasor under an automobile liability policy with limits of liability of \$100,000 per person for bodily injury, \$300,000 per occurrence for bodily injury, and \$50,000 for property damage. Atlantic Casualty insured Ray at the time of the collision under automobile liability insurance policy No. 001-455514. The policy in-

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sured one vehicle, the 1986 Dodge involved in the collision, and provided underinsured policy limits for bodily injury in the amount of \$100,000 per person and \$300,000 per accident.

Aetna settled Hall's claim for \$99,000. Of this amount, \$1,000 was paid from the medical payments provision and \$98,000 was paid from the liability coverage provision of the Aetna policy insuring the tortfeasor's car. Therefore, \$202,000 of the Aetna per occurrence liability coverage is available to Ray, Royal, and Barbour.

On 5 September 1991, Ray and Royal, by his guardian ad litem Richard M. Price, filed a complaint against Atlantic Casualty in Johnston County Superior Court under the North Carolina Declaratory Judgment Act, seeking a declaratory judgment that Atlantic Casualty's liability insurance policy provides for underinsured motorist (UIM) coverage for Ray and Royal in the amount of \$98,000. Pursuant to a Consent Order dated 5 February 1992, Ray and Royal filed an amended complaint on 13 February 1992 identical to the original complaint with the exception of adding Barbour as an additional party plaintiff.

On 14 April 1992, Atlantic Casualty moved for and was granted summary judgment based on the pleadings, responses to request for production of documents, and affidavits.

The single issue is whether an underinsured vehicle, as that term is used in N.C. Gen. Stat. § 20-279.21(b)(4), includes a tortfeasor's vehicle whose available liability insurance is less than the relevant UIM coverage.

UIM coverage applies under Section 20-279.21(b)(4) when "all liability bonds or insurance policies providing coverage for bodily injury caused by . . . the **underinsured highway vehicle** have been exhausted." N.C.G.S. § 20-279.21(b)(4) (Supp. 1989) (emphasis added). Thus, UIM coverage under Atlantic Casualty's policy necessarily depends on whether the tortfeasor's vehicle is an underinsured highway vehicle.

An underinsured highway vehicle is

a highway vehicle with respect to the ownership, maintenance, or use of which, the sum of the limits of liability under all bodily injury liability bonds and insurance policies applicable **at the time of the accident** is less than the applicable limits of liability under the owner's policy.

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N.C.G.S. § 20-279.21(b)(4) (emphasis added). Construing this statute, our Supreme Court has held that the appropriate comparison is between the tortfeasor's liability coverage and the victim's UIM coverage. *Harris v. Nationwide Mut. Ins. Co.*, 332 N.C. 184, 188, 420 S.E.2d 124, 127 (1992). That is, if the tortfeasor's liability coverage is less than the UIM coverage, the tortfeasor's vehicle is an underinsured vehicle. Under the plain language of N.C. Gen. Stat. § 20-279.21(b)(4), the comparison between the tortfeasor's liability coverage and the UIM coverage is to be made "at the time of the accident." N.C.G.S. § 20-279.21(b)(4).

Plaintiffs argue that because only \$202,000 was available to them from the tortfeasor's liability insurance, the \$202,000 must be measured against the \$300,000 UIM coverage and in so doing, qualify them for UIM coverage of \$98,000. We disagree. In this case, "at the time of the accident," the tortfeasor's liability coverage was identical to Ray's UIM coverage. Any payments the liability company made to an injured party after the date of the accident and which reduced the liability insurance available to these plaintiffs is not relevant to our inquiry. Thus, by definition, the tortfeasor's vehicle was not an underinsured vehicle, and the trial court correctly entered summary judgment for Atlantic Casualty.

Affirmed.

Judges EAGLES and ORR concur.

STATE OF NORTH CAROLINA v. BRIAN KEITH HOBGOOD

No. 9220SC1216

(Filed 5 October 1993)

Burglary and Unlawful Breakings § 10 (NCI4th)— second-degree burglary—condo available for rent—unoccupied

The trial court correctly denied defendant's motion to dismiss charges of second-degree burglary where it was not disputed that defendant broke and entered a condominium at night with intent to commit a felony therein, that the condo was one of approximately seventy available for rent and had been rented on other occasions, and that the condo was not

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rented on that night. When a condominium unit is in the ordinary course of events used as a dwelling or for sleeping by either the owner, the owner's family, or a renter, it qualifies as a dwelling or sleeping apartment within the meaning of the burglary statute. It is not material that the condominium was not rented on the night of the breaking or entering. N.C.G.S. § 14-51.

Am Jur 2d, Burglary § 3 et seq.

Appeal by defendant from judgment entered 31 January 1992 in Moore County Superior Court by Judge Melzer A. Morgan, Jr. Heard in the Court of Appeals 15 September 1993.

Attorney General Michael F. Easley, by Assistant Attorney General David N. Kirkman, for the State.

Appellate Defender Malcolm Ray Hunter, Jr., by Assistant Appellate Defender Susan G. White, for defendant-appellant.

GREENE, Judge.

On 31 January 1992, a jury found Brian Keith Hobgood (defendant) guilty of one count of second-degree burglary, and defendant was sentenced to a term of twenty-five years. Due to lack of accurate transmittal of court documents to the Office of the Appellate Defender, defendant lost his right to appeal. On 9 September 1992, the Office of the Appellate Defender filed a petition for writ of certiorari in this Court. On 17 September 1992, the petition was allowed.

For the purposes of this appeal, it is not disputed that on 8 February 1991, defendant broke and entered, at night, a condominium unit, owned by Jackie Upchurch and located in the Foxfire Resort Country Club in Moore County, with the intent to commit a felony therein. The undisputed evidence also reveals that the condominium was one of approximately seventy residential units available for rent through the Foxfire rental program, had been rented on other occasions, and was not rented or otherwise occupied on the night of 8 February 1991. Jackie Upchurch maintained a residence in High Falls.

The single issue presented is whether an uninhabited, unoccupied residential condominium unit, available for rent, is a "dwell-

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ing house or sleeping apartment" as those terms are used in the definition of burglary.

Burglary is an offense which consists of five elements: (1) a breaking, (2) and entering, (3) of a dwelling house or sleeping apartment of another, (4) in the nighttime, and (5) with the intent to commit a felony therein. N.C.G.S. § 14-51 (1986); *State v. Beaver*, 291 N.C. 137, 141, 229 S.E.2d 179, 181 (1976). If the dwelling house or sleeping apartment is occupied, it is burglary in the first degree. N.C.G.S. § 14-51. If the dwelling house or sleeping apartment is not occupied, it is burglary in the second degree. *Id.*; *State v. Alexander*, 18 N.C. App. 460, 461, 197 S.E.2d 272, 273, *cert. denied*, 283 N.C. 666, 198 S.E.2d 721, *cert. denied*, 284 N.C. 255, 200 S.E.2d 655 (1973).

A building qualifies as a dwelling house or sleeping apartment if "the owner or renter and his family, or any member of it," *State v. Jake*, 60 N.C. 471, 472 (1864), "regularly or habitually sleeps there." *State v. Foster*, 129 N.C. 704, 707, 40 S.E. 209, 210 (1901). Regular, usual, or habitual describes that which "occurs in ordinary practice or in the ordinary course of events." *Webster's Third New International Dictionary* 2524 (1966). "[M]ere casual use of a tenement as a lodging, or only upon some particular occasions, will not constitute it a dwelling-house" or a sleeping apartment. *State v. Jenkins*, 50 N.C. 430, 432 (1858). A motel room "regularly and usually occupied by travelers for the purpose of sleeping" is considered a sleeping apartment. *State v. Nelson*, 298 N.C. 573, 597, 260 S.E.2d 629, 646 (1979), *cert. denied*, 446 U.S. 929, 65 L. Ed. 2d 282 (1980); *see* 3 *Wharton's Criminal Law* § 335, at 208 (1980) ("rooms of an inn, hotel, or lodging house" regarded as dwelling house).

The defendant argues that because "no one was renting the condominium unit at the time of the break-in, and the owner . . . was not 'habitually dwelling and sleeping' there," the condominium was not a dwelling or sleeping apartment within the meaning of the burglary statute. We disagree.

It is not material that the condominium was not rented on the night of the breaking and entering. Likewise, it is not necessary that the owner or some family member habitually dwell or sleep in the unit. When a condominium unit is in the ordinary course of events used as a dwelling or for sleeping by either the owner, his family, or a renter, it qualifies as a dwelling or sleeping apart-

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ment within the meaning of the burglary statute. Because this residential condominium unit was regularly available for rent through a rental agency, it was in the ordinary course of events used as a dwelling or sleeping apartment and is within the meaning of the burglary statute. Accordingly, the trial court correctly denied the defendant's motion to dismiss the charges.

No error.

Judges EAGLES and ORR concur.

STATE OF NORTH CAROLINA EX REL. UTILITIES COMMISSION, PUBLIC STAFF NORTH CAROLINA UTILITIES COMMISSION, AND CAROLINA POWER AND LIGHT COMPANY AND DUKE POWER COMPANY AS INTERVENORS v. EMPIRE POWER COMPANY, APPLICANT FOR CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY

No. 9210UC724

(Filed 19 October 1993)

1. Utilities Commission § 51 (NCI3d)— independent power producer—certificate of public convenience and necessity denied—standard of review

Review of the Utilities Commission's decision to deny a certificate of public convenience and necessity (CPCN) to an independent power producer (IPP) is governed by N.C.G.S. § 62-94(b) (1989). The Court of Appeals will uphold a decision of the Commission unless it finds error based on one of the enumerated grounds in that statute.

Am Jur 2d, Public Utilities § 278.

2. Utilities Commission § 15 (NCI3d)— certification of public convenience and necessity— independent power producer— statutory authority

The Utilities Commission may resort to parts of Chapter 62 other than N.C.G.S. §§ 62-82 and 110.1 (the CPCN sections) for the processing of applications. Although petitioner, an independent power producer, argued that the Commission's dismissal of its application and its establishment of minimum filing requirements constituted an impermissible deviation from

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the process specifically provided in N.C.G.S. §§ 62-82 and 110.1, and that any deviation from these sections is beyond the Commission's authority and jurisdiction, N.C.G.S. §§ 62-110.1 and 62-82 do not provide the Commission with complete instructions for the process of awarding and denying certificates to applicants and the Commission may turn to the more general sections of Chapter 62, specifically, N.C.G.S. § 62-31 (1989) and N.C.G.S. § 62-60 (1989), for guidance in interpreting the process. In so doing, however, the Commission may not, and did not here, deviate from the process which is stated clearly and unambiguously in N.C.G.S. §§ 62-82 and 62-110.1.

Am Jur 2d, Public Utilities § 264.

- 3. Utilities Commission § 3 (NCI3d)— certification of public convenience and necessity— independent power producer— establishment of minimum filing requirements—not an unconstitutional exercise of legislative powers**

The Utilities Commission's establishment of minimum filing requirements in a certificate of public convenience and necessity case involving an independent power producer did not constitute an unconstitutional exercise of legislative powers. The General Assembly set forth a specific standard for the Commission with regard to electric generating facilities, *i.e.*, whether public convenience and necessity requires the construction of the proposed facility, and this standard is read *in pari materia* with N.C.G.S. § 62-2, which contains ten specific policies. The standard of public convenience and necessity and the policies of the State are sufficient to guide the Commission in deciding a CPCN case and the legislature's delegation of this authority is not unconstitutional.

Am Jur 2d, Public Utilities § 232.

- 4. Utilities Commission § 3 (NCI3d)— certification of public convenience and necessity— independent power producer— licensing of IPPs—reasonable relation to power supply**

Although an independent power producer contended that the Utilities Commission's deviation from the process prescribed by N.C.G.S. §§ 62-82 and 62-110.1 constituted an unconstitutional exercise of the police power of the State, and thus that the Commission should not be able to prevent petitioner from engaging in lawful business on its own land with private funds,

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the licensing of independent power producers has a reasonable relation to the creation of a reliable and economical power supply and the avoidance of the costly overbuilding of generation resources. The regulating statute will not be strictly construed because the supply and sale of electricity to other utilities is not an ordinary trade or occupation.

Am Jur 2d, Public Utilities § 232.

- 5. Utilities Commission § 5 (NCI3d) — certification of public convenience and necessity — independent power producer — process sufficiently clear**

Although an independent power producer contended that the certificate of public convenience and necessity process would be fraught with uncertainty if the Utilities Commission could find authority from sections other than N.C.G.S. §§ 62-82 and 62-110.1, N.C.G.S. § 62-82, when read in conjunction with other provisions of Chapter 62, is sufficiently clear to avoid that confusion.

Am Jur 2d, Public Utilities § 264.

- 6. Utilities Commission § 15 (NCI3d) — certification of public convenience and necessity — independent power producer — statutory time limit for hearing — not jurisdictional**

The language in N.C.G.S. § 62-82 requiring automatic issuance of a certificate of public convenience and necessity by the Utilities Commission if the Commission had not ordered a hearing and had not received a complaint within ten days after the last publication of notice did not apply to petitioner, an independent power producer, because the Commission received complaints from Duke Power and CP&L. Although the Commission merely scheduled and did not commence a hearing within the three-month period required by N.C.G.S. § 62-82(a), that language is directory and not jurisdictional.

Am Jur 2d, Public Utilities §§ 264, 266.

- 7. Utilities Commission § 3 (NCI3d) — certificate of public convenience and necessity — dismissal — hearing not required**

The Utilities Commission was not required by N.C.G.S. § 62-82(a) to hold a hearing before dismissing a certificate of public convenience and necessity application. Where N.C.G.S. § 62-82 is silent, the Commission may refer to the judicial

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powers of Chapter 62. The Commission's authority is described by N.C.G.S. § 62-60 as that of a court of general jurisdiction and the dismissal of the application here was, therefore, a proper exercise of its authority.

Am Jur 2d, Public Utilities § 266.

- 8. Utilities Commission § 15 (NCI3d)— certificate of public convenience and necessity—dismissal—forecast of evidence on issue of need—inadequate**

The Utilities Commission did not err by dismissing an application for a certificate of public convenience and necessity by an independent power producer where the forecast of evidence on the issue of need was inadequate. Although the determination of public convenience and necessity is essentially a factual inquiry, summary judgment is appropriate when there is no genuine issue as to any material fact. Petitioner failed to raise a genuine issue of material fact as to whether public need required construction of this facility.

Am Jur 2d, Public Utilities § 264.

Appeal by petitioner from order entered 23 April 1992, by the North Carolina Utilities Commission. Heard in the Court of Appeals 28 May 1993.

Petitioner Empire Power Company (Empire) is an independent power producer (IPP). IPP's, relatively new entrants into the power generation business, supply power on a contract basis to public utilities and others for resale.

On 31 October 1991, Empire, pursuant to N.C. Gen. Stat. § 62-110.1(a) (1989), submitted an application for a certificate of public convenience and necessity (CPCN), to construct a 600 megawatt combustion turbine electric generating facility, to be called Rolling Hills, in Rockingham County. On 19 November 1991, pursuant to N.C. Gen. Stat. § 62-82(a) (1989), the North Carolina Utilities Commission (the Commission) issued an order requiring petitioner to publish four weeks of public notice in Rockingham County. The order also required petitioner to serve a copy of its application and the public notice on each of the utilities to which it planned to sell electricity. On 22 November 1991, petitioner filed a verification that on 21 November 1991, it had served copies of the application and public notice on Carolina Power & Light (CP&L),

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Duke Power Company (Duke), and North Carolina Power. In a subsequent filing on 8 January 1992, petitioner asserted that it did not seek to sell to North Carolina Power. On 22 and 29 November and 6 and 13 December 1991, petitioner published its public notice, and on 30 December 1991, filed an affidavit of publication with the Commission. CP&L and Duke filed complaints and petitions to intervene in the proceeding on 20 and 23 December 1991, respectively. CP&L filed a motion to dismiss on 17 January 1992, followed by petitioner's motion for summary judgment, filed 4 February 1992. On 5 February 1992, the Commission heard arguments on both the motion to dismiss and the motion for summary judgment. The Commission entered an order 23 April 1992, dismissing petitioner's application, and finding that the decision rendered petitioner's motion for summary judgment moot. From this order, petitioner appeals.

Broughton, Wilkins, Webb & Jernigan, P.A., by William Woodward Webb and Sara M. Biggers, for petitioner-appellant.

Robert P. Gruber, Executive Director, by Gisele L. Rankin, Staff Attorney, for respondent-appellee, Public Staff—North Carolina Utilities Commission.

Len S. Anthony and Hunton & Williams, by Frank A. Schiller, for respondent-appellee, Carolina Power and Light Company.

Steve C. Griffith, Jr., William Larry Porter, Karol P. Mack, and Kennedy, Covington, Lobdell & Hickman, by Myles E. Standish, for respondent-appellee, Duke Power Company.

MCCRODDEN, Judge.

Petitioner's appeal, consisting of twelve assignments of error, requires our determination of three issues: (I) whether the Commission's dismissal of the petition for a CPCN exceeded the constitutional and legislative limits of the Commission's authority and jurisdiction over petitioner's application; (II) whether, once the Commission failed to order a hearing within ten days of publication, as required by N.C.G.S. § 62-82(a), the law required it to issue a CPCN to petitioner; and (III) whether the Commission had the authority, jurisdiction, and justification to dismiss petitioner's application. Within each of these general issues, petitioner presented additional questions which we will address in the order in which petitioner raised them.

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[1] We initially note that N.C. Gen. Stat. § 62-94(b) (1989) governs our review of the Commission's decision. That statute provides that an appellate court may reverse or modify a decision of the Commission if the decision prejudices substantial rights of petitioner, because the Commission's findings, inferences, conclusions, or decisions are:

- (1) In violation of constitutional provisions, or
- (2) In excess of statutory authority or jurisdiction of the Commission, or
- (3) Made upon unlawful proceedings, or
- (4) Affected by other errors of law, or
- (5) Unsupported by competent, material and substantial evidence in view of the entire record as submitted, or
- (6) Arbitrary or capricious.

N.C.G.S. § 62-94(b). This Court will uphold a decision of the Commission unless we find error based on one of the enumerated grounds of section 62-94(b). *State ex rel. Utilities Comm. v. Southern Bell*, 88 N.C. App. 153, 177, 363 S.E.2d 73, 87 (1987). The issues raised by petitioner relate to subsections (1) and (2), *i.e.*, whether the Commission's action violated constitutional provisions or was in excess of its statutory authority or jurisdiction.

I.

[2] We first determine the scope of the Commission's authority and jurisdiction pursuant to Chapter 62. Petitioner contends that the Commission's authority and jurisdiction in determining certification cases for IPPs are limited to that expressly granted in N.C.G.S. §§ 62-82 and 110.1 (the CPCN sections). We agree with petitioner that the Utilities Commission is a creature of the legislature and exercises only that authority conferred upon it by statute, *Utilities Com. v. Motor Lines*, 240 N.C. 166, 168, 81 S.E.2d 404, 406 (1954), but we do not agree with petitioner's narrow interpretation of the statute.

In its 23 April 1992 order, the Commission allowed CP&L's motion to dismiss on the ground that petitioner failed to show, as it must under section 62-110.1, that public convenience and necessity required construction of the Rolling Hills facility. Petitioner contends that the Commission's dismissal of its application and

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its establishment of minimum filing requirements constituted an impermissible deviation from the process specifically provided in sections 62-82 and 110.1, and any deviation from these sections is beyond the Commission's authority and jurisdiction.

Section 62-110.1 concerns the Commission's role in receiving and acting upon CPCN applications, and states that "no public utility or other person shall begin the construction of any . . . facility for the generation of electricity *to be directly or indirectly used* for the furnishing of public utility service . . . without first obtaining from the Commission a certificate that public convenience and necessity requires, or will require, such construction." N.C.G.S. § 62-110.1(a) (emphasis added). Section 62-82 concerns the special procedure to be followed when reviewing a CPCN application. Specifically, section 62-82(a) provides that when a CPCN application is filed:

[T]he Commission shall require the applicant to publish a notice thereof once a week for four successive weeks in a daily newspaper of general circulation in the county where such facility is proposed to be constructed and thereafter the Commission upon complaint shall, or upon its own initiative may, upon reasonable notice, enter upon a hearing to determine whether such certificate shall be awarded. Any such hearing must be commenced by the Commission not later than three months after the filing of such application If the Commission or panel does not, upon its own initiative, order a hearing and does not receive a complaint within 10 days after the last day of publication of the notice, the Commission or panel shall enter an order awarding the certificate.

N.C.G.S. § 62-82(a).

Petitioner maintains that the CPCN sections provide a sufficiently complete set of instructions, so that the Commission would not need to refer to other more general laws contained in Chapter 62. Petitioner cites *State ex rel. Utilities Comm. v. Edmisten*, 291 N.C. 451, 232 S.E.2d 184 (1977), in support of its argument that the general powers of the Commission, granted pursuant to the various sections of Chapter 62, cannot be inferred into statutes which are more specific in their application, *i.e.*, N.C.G.S. §§ 62-82 and 62-110.1. In *Edmisten*, the Supreme Court found that the language of N.C. Gen. Stat. § 62-134(e) was clear and unambiguous, and thus the Commission could not employ a more general statute,

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N.C. Gen. Stat. § 62-3(24), to alter the meaning and thus nullify section 62-134(e). We find the instant case distinguishable from *Edmisten* since we determine, as illustrated in part II of this opinion, that sections 62-110.1 and 62-82 do not provide the Commission with complete instructions for the process of awarding and denying certificates to applicants. Therefore, the Commission may turn to the more general sections of Chapter 62, specifically, N.C. Gen. Stat. § 62-31 (1989) and N.C. Gen. Stat. § 62-60 (1989), for guidance in interpreting the process not addressed in sections 62-82 and 62-110.1. In so doing, however, the Commission may not, and we find it did not, deviate from the process which is stated clearly and unambiguously in sections 62-82 and 62-110.1: the Commission required petitioner to publish notice once a week for four weeks; the notice was last published on 13 December 1991, and the Commission received two complaints within ten days following the last day of publication of petitioner's notice.

Within Chapter 62, sections 62-31 and 62-60 confer rule-making and judicial powers upon the Commission. However, petitioner argues that the CPCN sections narrowly circumscribe the Commission's jurisdiction over it since it is not a "public utility," and therefore the Commission should be limited to only those procedures specifically stated in sections 62-82 and 62-110.1. Since neither section 62-82 nor section 62-110.1 specifically provides for the dismissal of CPCN applications or the establishment of minimum filing criteria, petitioner maintains that the Commission should be prevented from employing those procedures. Assuming *arguendo* that petitioner is not a public utility, we nevertheless determine that the Commission's exercise of its judicial powers in ruling upon CPCNs for non-utilities is not limited exclusively to sections 62-82 and 62-110.1. Nothing in section 62-82(a) suggests that the North Carolina legislature intended to limit the Commission's exercise of its section 62-31 and section 62-60 powers in such a way as to exclude CPCN applications.

Furthermore, we have already determined that, although the Commission may not deviate from the provisions expressly stated in sections 62-82 and 62-110.1, the Commission may rely upon other sections in Chapter 62 to interpret and implement the process. Any other interpretation of the statute would leave the Commission without procedure in instances in which the General Assembly did not anticipate all of the facts and circumstances arising in the Commission's review of an application. Because the CPCN sec-

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tions do not contain complete instructions, they cannot be the sole source of the Commission's authority and jurisdiction over applications for certificates. For example, sections 62-82 and 62-110.1 contain no provisions concerning the Commission's authority to hear dispositive motions, motions on evidentiary matters, or motions related to discovery. We conclude that the Commission may resort to other parts of Chapter 62 for the processing of applications. This allows it to effectuate the purpose of the Chapter, which is to promote the policy of the State as set forth in N.C. Gen. Stat. § 62-2 (1989). *Utilities Comm. v. Edmisten*, 294 N.C. 598, 242 S.E.2d 862 (1978).

[3] Relying on these same assignments of error, petitioner also argues that the Commission's order dismissing petitioner's application was unconstitutional because it constituted an improper exercise of legislative powers. We agree with petitioner that the General Assembly cannot delegate to an administrative board the power to legislate. *Farlow v. Bd. of Chiropractic Examiners*, 76 N.C. App. 202, 211, 332 S.E.2d 696, 702, *disc. review denied*, 314 N.C. 664, 336 S.E.2d 621 (1985). We do not agree, however, that the Commission's establishment of minimum filing requirements constituted an unconstitutional exercise of legislative powers. In *Adams v. Dept. of N.E.R. and Everett v. Dept. of N.E.R.*, 295 N.C. 683, 249 S.E.2d 402 (1978), an instructive case for us, the Supreme Court addressed the legislature's delegation of authority to develop and adopt guidelines for the coastal areas of North Carolina to the Coastal Resources Commission. The Court stated:

In the search for adequate guiding standards the primary sources of legislative guidance are declarations by the General Assembly of the legislative goals and policies which an agency is to apply when exercising its delegated powers. We have noted that such declarations need be only "as specific as the circumstances permit." When there is an obvious need for expertise in the achievement of legislative goals the General Assembly is not required to lay down a detailed agenda covering every conceivable problem which might arise in the implementation of the legislation. It is enough if general policies and standards have been articulated which are sufficient to provide direction to an administrative body possessing the expertise to adapt the legislative goals to varying circumstances.

Id. at 698, 249 S.E.2d at 411 (citation omitted).

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With regard to electric generating facilities, the General Assembly set forth a specific standard for the Commission, *i.e.*, whether public convenience and necessity requires the construction of the proposed facility. We read this standard *in pari materia* with N.C.G.S. § 62-2 which contains ten specific policies, among which are promoting the inherent advantages of regulated public utilities and adequate, reliable, and economic utility service, including the entire spectrum of demand side option as resources necessary to meet future growth, and fostering continued service of public utilities on a well-planned and coordinated basis. We believe that the standard of public convenience and necessity and the policies of the State are sufficient to guide the Commission in deciding a CPCN case and that the legislature's delegation of this authority is not unconstitutional.

[4] Petitioner next contends that the Commission's deviation from the process prescribed by sections 62-82 and 62-110.1 constituted an unconstitutional exercise of the police power of the State, and thus the Commission should not be able to prevent petitioner from engaging in lawful business, on its own land, with private funds. The cases cited by petitioner are distinguishable from the instant case, and we therefore find this argument meritless. *State v. Harris*, 216 N.C. 746, 6 S.E.2d 854 (1940), cited by petitioner, involved the licensing of individuals in the dry cleaning business. The Supreme Court distinguished between industries requiring scientific or technical knowledge and skill and those which are "ordinary trades and occupations, harmless in themselves, in many of which men have engaged immemorially as a matter of common right" *Id.* at 756, 6 S.E.2d at 861. The Court found that the dry cleaning business fit in the latter category, and thus strictly reviewed the statute. The Court stated that an exercise of police power may be valid if the proposed restriction has a reasonable relation to the evil it purports to remedy. *Id.* at 759-60, 6 S.E.2d at 863.

The facts in the instant case show that petitioner does not intend to engage in the type of "ordinary trade or occupation" referred to in *Harris*, such as the Court considered the dry cleaning business to be in 1940. Because the supply and sale of electricity to other utilities is not an ordinary trade or occupation, we will not strictly construe the statute. We find that the licensing of IPPs has a reasonable relation to the creation of a reliable and economical power supply and the avoidance of the costly over-

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building of generation resources. *See State ex rel. Utilities Comm. v. Eddleman*, 320 N.C. 344, 358 S.E.2d 339 (1987).

Petitioner also cites *In re Hospital*, 282 N.C. 542, 193 S.E.2d 729 (1973), in which the Supreme Court overturned N.C. Gen. Stat. § 90-291, which required a certificate of public convenience and necessity before beginning construction of a hospital, finding that the General Assembly had not established a reasonable relationship between the regulation of private facilities for medical care and the public health. After that opinion, however, the legislature repealed the statute on which the case was based and enacted N.C. Gen. Stat. §§ 131E-175 to -190 (1992), which requires certificates of need in the development of new institutional health services and which rendered moot the holding of *In re Hospital*. Moreover, even if the case were not moot, the Supreme Court distinguished the public utility business from the medical industry, stating:

In the public utility businesses competition, deemed unnecessary, is curtailed by the requirement that one desiring to engage in such business procure from the Utilities Commission a certificate of public convenience and necessity. However, in those fields the State has undertaken to protect the public from the customary consequences of monopoly by making the rates and services of the certificate holder subject to regulation and control by the Utilities Commission. No comparable power to regulate hospital rates and services has been given to the Medical Care Commission.

Id. at 550, 193 S.E.2d at 734-35 (citations omitted). Indeed, one of the purposes of Chapter 62 is to "promote the inherent advantages of regulated public utilities." N.C.G.S. § 62-2(2). Although we need not reach the question of whether petitioner is a public utility, we find that the statute indicates that there is a substantial public purpose in the licensing of power generating facilities such as that proposed by petitioner.

[5] Finally, we summarily dismiss petitioner's argument that, if the Commission may find authority from sections other than 62-82 and 62-110.1, the entire CPCN process would be fraught with uncertainty. We find section 62-82, when read in conjunction with other provisions of Chapter 62, sufficiently clear to avoid the confusion suggested by petitioner.

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II.

[6] In petitioner's next assignment of error, it contends that section 62-82 presents a jurisdictional time limit, during which the Commission must order a hearing in order to maintain jurisdiction over the CPCN process. We do not agree with petitioner's analysis of section 62-82 that, if the Commission does not order a hearing, it must award a certificate within ten days of the last day of the publication of the notice. Section 62-82(a) provides, "[i]f the Commission or panel does not, upon its own initiative, order a hearing *and* does not receive a complaint within 10 days after the last day of publication of the notice, the Commission or panel shall enter an order awarding the certificate." (Emphasis added). We find it unnecessary to determine whether the phrase *within ten days of the last day of the publication* applies only to the period of time within which the Commission must receive a complaint, as suggested by the doctrine of the last antecedent, *HCA Crossroads Residential Ctrs. v. N.C. Dept. of Human Res.*, 327 N.C. 573, 578, 398 S.E.2d 466, 469 (1990), because it is clear that the Commission's receipt of Duke's and CP&L's complaints to petitioner's application defeated the automatic issuance of the certificate.

Petitioner also argues that the Commission failed to commence a hearing within three months after the filing of the CPCN application, and therefore, the Commission is without jurisdiction to act in any manner other than to award a certificate to petitioner. We agree that the Commission failed to commence a hearing within the three-month period, as required by section 62-82(a). Section 62-82(a) requires that "[t]he hearing must be commenced by the Commission *not later than three months after filing of such application.*" (Emphasis added). Since petitioner filed its application on 31 October 1991, the three-month time period for commencing a hearing began to run from this date. On 22 January 1992, the Commission scheduled oral argument on CP&L's motion to dismiss for 5 February 1992.

Black's Law Dictionary defines the word "commence" as "to initiate by performing the first act" or "to institute or start." *Black's Law Dictionary*, 6th Edition 268 (1990). We find unpersuasive the Commission's argument that the order of 22 January 1992, scheduling oral argument to be held on 5 February 1992 which is outside the three-month time period, constituted a commencement of the hearing. If we were to find that the mere scheduling of a hearing

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constituted a commencement, the Commission could schedule a hearing in the indefinite future, which is clearly not the intent of the statute. The General Assembly intended that the determination whether to award a CPCN certificate be an expedient procedure; section 62-82 provides that the procedure for "rendering decisions" during the hearing of a CPCN application shall take precedence over all other matters on the Commission's calendar, except for rate cases conducted pursuant to N.C. Gen. Stat. § 62-81 (1989).

Since the Commission failed to commence a hearing within three months, petitioner maintains the Commission was left with jurisdiction *only* to grant a certificate to petitioner. We disagree. Whether the time provisions of section 62-82(a) are jurisdictional in nature depends upon whether the legislature intended the language to be mandatory or directory. *Art Society v. Bridges*, 235 N.C. 125, 130, 69 S.E.2d 1, 5 (1952). Many courts have observed that statutory time periods are generally considered to be directory rather than mandatory unless the legislature expresses a consequence for failure to comply within the time period. *See Meliezer v. Resolution Trust Co.*, 952 F.2d 879, 883 (5th Cir. 1992); *Thomas v. Barry*, 729 F.2d 1469, 1470 n. 5 (D.C. Cir. 1984). If the provisions are mandatory, they are jurisdictional; if directory, they are not.

Section 62-82 clearly specifies that one provision is mandatory, and that is the one that *requires* that a certificate be issued if the Commission does not order a hearing at all and there is no complaint filed within ten days of the last date of publication. However, the statute is silent as to the consequences, if any, which would result from the Commission's failure to commence a hearing within the three-month time period. When the General Assembly, in the same statute, expressly provides for the automatic issuance of a certificate under different circumstances (the Commission does not order a hearing and no complaint is filed), the only logical conclusion is that the General Assembly only intended for an automatic issuance to occur in that specific situation. *Cf. Campbell v. Church*, 298 N.C. 476, 482, 259 S.E.2d 558, 563 (1979) (an exchange of real property between a redevelopment commission and a church must comply with the advertisement and bid requirements of N.C. Gen. Stat. § 160A-514(d), since the statute contained certain instances, of which an exchange was not included, where advertisement and bids are not required).

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Petitioner relies upon *HCA Crossroads*, which held that an agency's failure to act on a certificate of need within the time period provided by N.C. Gen. Stat. § 131E-185 divested the agency of jurisdiction to take any action other than issuing the certificate. *HCA Crossroads* is inapplicable to the case at hand because the Court addressed a statute (N.C.G.S. § 131E-185) which contains specific language stating that the "Department shall issue . . . a certificate of need with or without conditions *or reject the application within the review period.*" *HCA Crossroads*, 327 N.C. at 577, 398 S.E.2d at 469 (emphasis added); N.C.G.S. § 131E-185(b). The absence of any such explicit language in section 62-82(a) distinguishes this case from *HCA Crossroads*.

The Commission's automatic issuance of a certificate, when complaints and motions to intervene have been filed in the matter and a sufficient showing of public need has not been made, would be contrary to the purpose of section 62-110.1(a). The primary purpose of the statute is to provide for the orderly expansion of the State's electric generating capacity in order to create the most reliable and economical power supply possible and to avoid the costly overbuilding of generation resources. *Eddleman*, 320 N.C. at 362, 358 S.E.2d at 351. In order to give effect to this purpose, we find the language in section 62-82 to be directory and, thus, not jurisdictional.

III.

[7] We likewise reject petitioner's final set of arguments further questioning the authority, jurisdiction, and justification of the Commission's action. The first of these arguments is that section 62-82(a) requires the Commission to hold a hearing before it can dismiss a CPCN application. Petitioner bases its interpretation upon its earlier argument that the Commission's powers over CPCN applications are limited to those enumerated in sections 62-82 and 62-110.1. As previously stated, however, where section 62-82 is silent, the Commission may refer to the judicial powers of Chapter 62 to supplement its procedure for awarding or denying certificates. Section 62-60 describes the Commission's authority as that of a court of general jurisdiction in which it "shall render its decision upon questions of law and fact in the same manner of a court of record." The Commission's dismissal of the application was, therefore, a proper exercise of its authority. We also note that, although petitioner initially opposed CP&L's motion to dismiss on the basis

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that section 62-80 did not authorize it, it later filed a motion for summary judgment, arguably abandoning its position concerning the authority of the Commission.

[8] We also do not agree with petitioner's argument that the Commission erred in dismissing its application because, according to petitioner, it had established the need for its proposed facility in its application. Before awarding a certificate, the Commission must comply with section 62-110.1 which requires a showing of public convenience and *necessity* by the applicant. Subsection (d) mandates the Commission's consideration of the "applicant's arrangement with other electric utilities for interchange of power, pooling of plant, purchase of power and other methods for providing reliable, efficient and economical electric service." Petitioner's application stated that it had an outstanding proposal to sell long-term wholesale peaking capacity and energy to Duke for delivery beginning as early as 1994. Duke, however, had refused this proposal. Additionally, the application, citing dated testimony from previous Commission hearings, generally asserted that there was a need for its proposed facility across the state as well as within the Duke service territory. We find that this forecast of evidence on the issue of need was inadequate and that the Commission's dismissal was proper.

Petitioner argues that the Commission's dismissal of its application was similar to granting summary judgment and was in error, because the issue of public convenience and necessity was a genuine issue of material fact. Although the determination of public convenience and necessity is essentially a factual inquiry, summary judgment is appropriate when there is no genuine issue as to any material fact. N.C. Gen. Stat. § 1A-1, Rule 56(a) (1990). The Commission based its order dismissing petitioner's application upon the following facts: petitioner is an IPP and, as such, proposed to construct a 600 megawatt electric generating facility in Rockingham County; it based public need for this facility upon the allegation that Duke and/or CP&L needed such a facility; neither Duke, CP&L, nor any other public utility, however, had committed to purchase the output of petitioner's proposed facility; and in fact both Duke and CP&L objected to petitioner's application. Petitioner failed to raise any genuine dispute concerning these facts.

The Utilities Commission is required to regulate the expansion of electric utility plants in North Carolina and, before issuing a

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CPCN, must establish a public need for a proposed generating facility. *In re Duke Power Co.*, 37 N.C. App. 138, 245 S.E.2d 787, *disc. review denied*, 295 N.C. 646, 248 S.E.2d 257 (1978). Petitioner failed to raise a genuine issue of material fact that public need required construction of the Rolling Hills facility, and the Commission's dismissal of its application was appropriate. The Commission's decision was without prejudice to petitioner's right to file another application at some future date.

In finding that there was no genuine issue of material fact as to the public need for the Rolling Hills facility, we have no need, and we decline, to address petitioner's question of whether the Commission appropriately linked the need for petitioner's power to a requirement, first stated in the Commission's order, that petitioner have a contract to sell such power.

For the foregoing reasons, we affirm the Commission's dismissal of petitioner's application for a certificate of public convenience and necessity.

Affirmed.

Judges WELLS and JOHN concur.

STATE OF NORTH CAROLINA v. THOMAS ALLEN NAJEWICZ

No. 9214SC5

(Filed 19 October 1993)

1. Evidence and Witnesses § 120 (NCI4th)— cross-examination about previous rape claims—issue not properly presented

The trial court did not err by failing to allow defendant to cross-examine an alleged rape victim as to whether she had made any previous claims of rape because defendant failed to properly present this issue to the trial court where defendant merely requested to cross-examine the victim concerning "her previous sexual relationships outside of marriage," the trial court conducted an *in camera* hearing pursuant to the Rape Shield Statute, and defendant at no point attempted or requested permission to question the victim concerning

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whether she had ever accused anyone other than defendant of rape. N.C.G.S. § 8C-1, Rule 412(b).

Am Jur 2d, Rape §§ 55 et seq., 86, 87.

Impeachment or cross-examination of prosecuting witness in sexual offense trial by showing that prosecuting witness threatened to make similar charges against other persons. 71 ALR4th 448.

Modern status of admissibility, in forcible rape prosecution, of complainant's prior sexual acts. 94 ALR3d 257.

2. Evidence and Witnesses § 122 (NCI4th)— Rape Shield Statute—in camera hearing—provision of transcript to State

The trial court did not err by providing to the State a transcript of defendant's testimony at an *in camera* hearing held pursuant to the Rape Shield Statute. N.C.G.S. § 8C-1, Rule 412(e).

Am Jur 2d, Rape § 55 et seq.

3. Evidence and Witnesses § 3076 (NCI4th)— Rape Shield Statute—in camera hearing testimony—use for impeachment

Where the defendant in a rape trial testified on direct examination that the prosecutrix told him of a previous sexual assault several weeks before he engaged in sex with her, the State was properly permitted to impeach defendant by use of his prior inconsistent testimony at an *in camera* hearing under the Rape Shield Statute that the prosecutrix led him to believe she was a virgin until moments before they had intercourse when she revealed she had been raped by a former boyfriend since (1) the Rape Shield Statute may not be utilized as a barrier to prevent cross-examination concerning critical inconsistencies in sworn testimony, and (2) the use of the *in camera* transcript did not constitute impeachment on a collateral matter.

Am Jur 2d, Witnesses §§ 929 et seq., 941.

4. Criminal Law § 541 (NCI4th)— discussion of case by jurors during recess—no denial of fair trial

Defendant was not denied a fair trial by the trial court's failure to inquire if the jury had begun deliberations before all the evidence was presented when a juror advised the court

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shortly after the trial began that some jurors were discussing the case during a recess where the court gave a curative instruction that the jury should remain open-minded and not discuss the case until it formally retired for deliberations, and defendant made no motion for a mistrial or other request for any other court action based upon the alleged juror misconduct.

Am Jur 2d, Trial § 1610.

Propriety and effect of jurors' discussion of evidence among themselves before final submission of criminal case. 21 ALR4th 444.

5. Evidence and Witnesses § 694 (NCI4th)— exclusion of evidence—failure of record to show what testimony would have been

The exclusion of testimony by defendant's supervisor in response to defendant's question seeking her opinion as to whether defendant was "capable of raping anyone" was not presented for appellate review where the record fails to show what the testimony of the witness would have been had she been permitted to answer the question. While the response anticipated by defendant may be inferred, the answer of the witness is not apparent from the context of the question within the purview of N.C.G.S. § 8C-1, Rule 103(a).

Am Jur 2d, Appeal and Error § 604; Trial §§ 440, 443.

Comment Note.—Ruling on offer of proof as error. 89 ALR2d 279.

6. Evidence and Witnesses §§ 2047, 2152 (NCI4th)— lay opinion testimony—capability of rape—perceptions and observations of witness—legal term of art

Opinion testimony by defendant's supervisor as to whether defendant was "capable of raping anyone" was properly excluded because (1) there was no foundation showing that the opinion called for was rationally based upon the perception and observations of the witness, and the word "raping" is a legal term of art not readily apparent to the witness.

Am Jur 2d, Expert and Opinion Evidence §§ 26 et seq.; Rape § 68.

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7. Criminal Law § 820 (NCI4th) — rape prosecutrix and mother — failure to give “interested witness” instruction

The trial court did not commit plain error in a rape case by failing to instruct the jury that the prosecutrix and her mother were “interested witnesses” after it had instructed that two defense witnesses were “interested” where defendant made no request for such an instruction. Moreover, the trial court’s instruction that, in determining whether to believe any witness, the jury could consider any interest, bias or prejudice the witness may have was sufficient to place before the jury the credibility of the prosecutrix and her mother.

Am Jur 2d, Trial § 1412.

Appeal by defendant from judgment entered 29 November 1990 by Judge Anthony M. Brannon in Durham County Superior Court. Heard in the Court of Appeals 9 February 1993.

Attorney General Lacy H. Thornburg, by Special Deputy Attorney General Henry T. Rosser, for the State.

Appellate Defender Malcolm Ray Hunter, Jr., by Assistant Appellate Defender Mark D. Montgomery, for defendant-appellant.

JOHN, Judge.

Defendant was convicted of one count of first degree rape. He contends the trial court erred by: (1) prohibiting questioning of the prosecuting witness regarding whether she had ever previously claimed to have been raped or sexually harassed; (2) allowing the prosecution to impeach his trial testimony with a transcript of his testimony from an *in camera* hearing conducted pursuant to N.C.R. Evid. 412; (3) failing to make inquiry of the jury as to whether it had prematurely begun deliberations; (4) not allowing a defense witness to answer whether defendant was “capable of raping anyone”; and (5) failing to instruct the jury the prosecuting witness and her mother were “interested witnesses.” We determine these contentions fail.

The State’s evidence tended to show defendant was manager of an “Ole” Jewelry Store in South Square Mall in Durham. Lara S. (Lara), age twenty, was a part-time employee at the store. Lara testified she and defendant were friends who went together to

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lunch and on one occasion, a movie. At some point, defendant began sending her letters and asking her out on dates. She declined these offers and notified "Ole" she was quitting. On the evening of 24 May 1990, defendant informed Lara she did not have to work because he had dinner reservations for them. They departed the mall in her truck and stopped by defendant's apartment. Upon entering the apartment, defendant handed her the following note:

Dearest Lara,

If you don't want to get hurt, don't scream. If you do I will beat and torture you. If you cooperate, you will not get hurt. Do not try to get away, bite, fight, scream or you may end up dead. If we are in the truck you will get out on my side slowly with me, acting like you want to, walk hand in hand with me into the apt. I don't want to have to handcuff you but I will. If you cooperate, you will be safely home before midnight. Unharmed, healthy, a little sad maybe, but you will be safe only if you cooperate. Don't, and you will never see your mother or anyone else again. Now sit down on the floor and I'll explain why I'm doing all this. Some of the things we'll be doing may seem sick or disgusting, but they will save your well being. No crying permitted and you must whisper.

Lara testified she read the note and then started to leave defendant's apartment. She stopped upon seeing him holding a knife. Defendant told her she "wasn't going anywhere and he didn't want to use his knife." She tried to leave one other time, but he told her to "sit back down." In the course of the evening, defendant handed Lara a second note which contained several lists of activities, many of which were sexual in nature. She crumbled this note and threw it back at him. Defendant became enraged and began to make verbal threats. He then told her to get onto the mattress where they subsequently had sexual relations. Lara further testified she did not resist because she believed defendant would kill her. She was finally allowed to leave around 11:30 p.m.

Several other witnesses testified for the State, including Dr. Catherine Lohr Moore, who was the examining physician, and Detective Darryl Dowdy, who was the police investigator assigned to the case. In addition, the State called Lara's mother as a rebuttal witness.

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Defendant testified on his own behalf, asserting the sexual intercourse was consensual. According to defendant, the notes were written as a practical joke and as part of the couple's consensual relations during the course of the evening. Defendant's mother and his supervisor at "Ole" also testified on his behalf and stated he was in the habit of pulling practical jokes.

I.

In his first assignment of error, defendant contends the trial court erred by not allowing him to cross-examine Lara concerning whether she had ever (1) claimed to have been sexually harassed by earlier employers and (2) claimed to have been raped by previous boyfriends. According to defendant, these two lines of questioning were permissible under N.C.R. Evid. 412 (1991), commonly known as the "Rape Shield Statute."

We first note defendant was indeed allowed to question Lara concerning whether she had ever claimed to have been sexually harassed, and accordingly his argument in this regard is without merit.

[1] As to defendant's second assertion concerning any previous claims of rape, we determine he failed to present this issue properly to the trial court.

Under our Rape Shield Statute, the *sexual behavior* of the prosecuting witness is irrelevant unless the behavior is as follows:

- (1) Was between the complainant and the defendant; or
- (2) Is evidence of specific instances of sexual behavior offered for the purpose of showing that the act or acts charged were not committed by the defendant; or
- (3) Is evidence of a pattern of sexual behavior so distinctive and so closely resembling the defendant's version of the alleged encounter with the complainant as to tend to prove that such complainant consented to the act or acts charged or behaved in such a manner as to lead the defendant reasonably to believe that the complainant consented; or
- (4) Is evidence of sexual behavior offered as the basis of expert psychological or psychiatric opinion that the complainant fantasized or invented the act or acts charged.

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At trial defendant merely requested to cross-examine the prosecuting witness concerning "her previous sexual relationships outside of marriage." After this request, the trial court conducted an *in camera* hearing as required by Rule 412(d). However, defendant at no point attempted to question Lara concerning whether she had ever accused someone other than defendant of rape; in fact he never even requested permission to conduct such an examination. We further note defendant made no reference to any of the four relevant categories of inquiry as per Rule 412(b). A contention which is not made at trial cannot be raised for the first time on appeal. *Plemmer v. Matthewson*, 281 N.C. 722, 725, 190 S.E.2d 204, 206 (1972).

II.

In his next assignment of error, defendant alleges the trial court erred by (1) providing the State with a transcript of defendant's testimony from the N.C.R. Evid. 412 *in camera* hearing and (2) allowing the State to impeach defendant with his testimony from this hearing.

During the *in camera* hearing, defendant testified Lara led him to believe she was a virgin until moments before they had intercourse when she revealed she had been raped by a former boyfriend. Later, on *direct examination* and in the presence of the jury, defendant testified concerning the contents of a letter he had written more than two weeks before the incident in question. According to this letter, Lara had informed defendant of the earlier rape *long before* the night on which the intercourse occurred. Thereafter, on *cross-examination*, the State used the transcript from the *in camera* hearing to question defendant as to how he could believe Lara was a virgin on that night since she had previously told him she had been raped. According to defendant, this cross-examination violated both Rule 412(e) and the mandate holding a witness may not be impeached on a collateral matter by use of extrinsic evidence. We find defendant's arguments unpersuasive.

A.

[2] North Carolina's Rape Shield Statute provides explicit instruction regarding the extent to which testimony from a Rule 412 *in camera* hearing may be used:

The record of the in camera hearing and all evidence relating thereto shall be open to inspection only by the parties, the

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complainant, their attorneys and the court and its agents, and shall be used only as necessary for appellate review. At any probable cause hearing, the judge shall take cognizance of the evidence, if admissible, at the end of the in camera hearing without the questions being repeated or the evidence being resubmitted in open court.

Rule 412(e) (emphasis added). Defendant argues the State's cross-examination breached Rule 412(e) in two regards.

Defendant's *first* claim, that the State should not have been provided with a transcript of the *in camera* hearing, is unfounded. Rule 412(e) expressly provides "[t]he record of the *in camera* hearing . . . shall be open to inspection . . . by the parties"

[3] Regarding defendant's *second* assertion concerning use of the transcript for impeachment purposes, we observe the General Assembly enacted the Rape Shield Statute to protect the privacy of the *prosecutrix*, not the accused. See *State v. Clontz*, 305 N.C. 116, 122-23, 286 S.E.2d 793, 796-97 (1982) (construing former N.C.G.S. § 58.6). "This statute was designed to protect the [prosecuting] witness from unnecessary humiliation and embarrassment while shielding the jury from unwanted prejudice that might result from evidence of sexual conduct which has little relevance to the case and has a low probative value." *State v. Younger*, 306 N.C. 692, 696, 295 S.E.2d 453, 456 (1982). However, even as regards the prosecuting witness, this Rule does not bar certain prior inconsistent statements.

In *State v. Younger*, the prosecutrix testified at the preliminary hearing she engaged in sexual intercourse with defendant's roommate on the night of the alleged rape. *Younger*, 306 N.C. at 695, 295 S.E.2d at 455. However, *only hours after the alleged incident*, she had told the examining physician it had been one month since she last had sex. *Id.* at 695-97, 295 S.E.2d at 455-56. In *Younger*, as in the case *sub judice*, the question of *consent* was focal. Due to the crucial nature of the prosecutrix' credibility, denial of the opportunity to impeach her concerning this prior inconsistent statement was held prejudicial error: "[i]t is our belief that the statute was not designed to shield the prosecutrix from the effects of her own inconsistent statements which cast a grave doubt on the credibility of her story." *Younger*, 306 N.C. at 697, 295 S.E.2d at 456. The Court further observed "the statute was not intended to act as a barricade against evidence which is used to prove

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issues common to all trials. Inconsistent statements are, without a doubt, an issue common to all trials." *Id.* at 697, 295 S.E.2d at 456; *see also State v. Johnson*, 66 N.C. App. 444, 446, 311 S.E.2d 50, 51-52, *disc. review denied*, 310 N.C. 747, 315 S.E.2d 707 (1984).

Thus, contrary to defendant's position, Rule 412 may not be utilized as a barrier to prevent cross-examination concerning critical inconsistencies in sworn testimony. Under authority of *Younger*, therefore, the prosecution was properly permitted to cross-examine defendant concerning his prior inconsistent statements made at the *in camera* hearing.

B.

We are also unconvinced by defendant's claim the prosecution's questions concerned a collateral matter and thus defendant was improperly impeached by use of extrinsic evidence, *i.e.*, the transcript from the *in camera* hearing.

In *State v. Williams*, 322 N.C. 452, 368 S.E.2d 624 (1988), our Supreme Court set out the basic principles of this rather complex area of evidence:

A witness may be cross-examined by confronting him with prior statements inconsistent with any part of his testimony, but where such questions concern matters collateral to the issues, the witness's answers on cross-examination are conclusive, and the party who draws out such answers will not be permitted to contradict them by other testimony.

Id. at 455, 368 S.E.2d at 626 (quoting *State v. Green*, 296 N.C. 183, 192, 250 S.E.2d 197, 203 (1978)).

Under *Williams*, it is clear a prior inconsistent statement may not be used to impeach a witness if the questions concern matters which are only collateral to the central issues. *Accord State v. Hunt*, 324 N.C. 343, 348, 378 S.E.2d 754, 757 (1989). In *Williams*, a rape prosecution, defendant's brother-in-law testified on his behalf. When asked whether he had told his probation officer defendant had admitted having sex with the prosecutrix, the witness responded in the negative. *Williams*, 322 N.C. at 453, 368 S.E.2d at 625. The State thereafter called the brother-in-law's probation officer who testified concerning the statement allegedly made by the witness. *Id.* at 454, 368 S.E.2d at 625. Our Supreme Court ordered a new trial, stating:

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[T]estimony concerning what [the brother-in-law] did or did not tell his probation officer was collateral to the issues in the case; therefore, it was improper to impeach him on this point by offering [extrinsic evidence] . . . [The extrinsic evidence] was not offered to prove that defendant had, in fact, made the alleged statements . . . [but] was offered solely to contradict [the brother-in-law's] testimony that he had not *told* [his probation officer] that defendant made these statements. While the *substance* of those statements and whether defendant made them would be material, whether [the brother-in-law] had *told* anyone about defendant's statements is clearly collateral.

Id. at 456, 368 S.E.2d at 626.

Frequently, it is unclear what is "collateral" and what is "material." However, as a general rule, "collateral matters" are those which are irrelevant to the issues in the case; they involve immaterial matters and irrelevant facts inquired about to test observation and memory. 1 H. Brandis, *Brandis on North Carolina Evidence* § 48, at 227-28 (1988). Recently, in summarizing North Carolina law dealing with impeachment on collateral matters, this Court observed once a witness *denies* having made a prior inconsistent statement, the State may not introduce the prior statement in an attempt to discredit the witness; the prior statement concerns only a *collateral matter*, i.e., whether the statement was ever made. *State v. Minter*, 111 N.C. App. 40, 48, 432 S.E.2d 146, 151 (1993).

In the case *sub judice*, we note defendant *never denied* having made his earlier *in camera* statements and therefore *Minter* is inapplicable. Furthermore, the State's use of the *in camera* transcript did not constitute impeachment on a collateral matter. The State utilized the transcript to impeach defendant's version of the circumstances surrounding the sexual relations between Lara and himself. On *direct examination*, defendant asserted Lara told him of a previous sexual assault several weeks before consensual intercourse, while at the earlier *in camera* hearing he testified she had revealed this only moments before. In resolving the critical issue of consent at defendant's trial, the jury of necessity compared and evaluated the relative credibility of both Lara and defendant. Conflicts between defendant's past and present accounts of the incident in question and the events leading up to it were highly material to the basic issue in the case, and we are thus unable to say the impeachment concerned a "collateral" matter.

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Based on the foregoing, therefore, we hold the trial court committed no error, under either of defendant's theories, by allowing the cross-examination of defendant regarding his earlier testimony.

III.

[4] Defendant next maintains he was deprived of a fair trial when the trial court failed to inquire if the jury had begun deliberations before all the evidence was presented. We conclude defendant's argument cannot be sustained.

Shortly after the trial began, a juror approached the court and advised some other jurors were discussing the case during recess. These alleged discussions were in violation of both the trial court's previous instructions and applicable North Carolina law. *See State v. Drake*, 31 N.C. App. 187, 190, 229 S.E.2d 51, 53 (1976). Out of the presence of the jury, the trial court subsequently solicited suggestions from counsel and defendant's attorney stood mute. Before next exiting the courtroom, the jury was given a curative instruction, which provided in essence the jury was to remain open-minded and not discuss the case until they formally retired for deliberations.

Defendant relies heavily upon *State v. Bindyke*, 288 N.C. 608, 220 S.E.2d 521 (1975), in claiming the court erred by not examining the jury concerning the alleged discussions. In *Bindyke*, an alternate juror was present in the jury room after the jury had formally adjourned for deliberations. Although defendant never objected at trial, our Supreme Court held "at any time an alternate is in the jury room *during deliberations* he participates by his presence and, whether he says little or nothing, his presence will void the trial." *Id.* at 627-28, 220 S.E.2d at 533 (emphasis in original). This rule is mandated since our state constitution contemplates a jury "of twelve persons who reach their decision in the privacy and confidentiality of the jury room." *Id.* at 623, 220 S.E.2d at 531. However, a mistrial may not be necessary if the alternate is only momentarily present in the jury room and deliberations have not yet begun. If the trial court feels this is the case, it may ask the jury in open court "whether there [has] been *any* discussion of the case." *Id.* at 629, 220 S.E.2d at 534. A mistrial is required *only* where the jury's answer is "yes." *Id.* at 629-30, 220 S.E.2d at 534-35.

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We consider *Bindyke* inapposite. "At the heart of the Court's holding in *Bindyke* was the appearance of impropriety during the *deliberations* of the jury." *State v. Kennedy*, 320 N.C. 20, 30, 357 S.E.2d 359, 365 (1987). Here the alleged impropriety did not occur during formal deliberations, but rather very early in the presentation of the State's case. In fact, only Lara had testified and was just beginning to describe the events of the evening in question.

In *State v. Drake*, 31 N.C. App. 187, 229 S.E.2d 51 (1976), decided after *Bindyke*, this Court was confronted with a situation nearly identical to the present case: "alleged discussions solely among jurors before the time for deliberation in the jury room." *Id.* at 191, 229 S.E.2d at 54. There, we noted such discussions violate established legal principles, but do not necessarily vitiate the verdict. *Id.* at 192, 229 S.E.2d at 55. However, a new trial was dictated in *Drake* because the trial court denied defendant's timely motion for mistrial "without [first] determining the truth about the alleged misconduct and, if true, the effect . . . upon [the] jurors." *Id.* at 192, 229 S.E.2d at 55.

Where juror misconduct is *alleged*, therefore, the trial court must investigate the matter and make appropriate inquiry. Unlike *Drake* however, defendant, although given ample opportunity by the trial court, made no motion for mistrial or request for other court action based upon the alleged juror misconduct. We further note the scope of appellate review in this matter is limited; the trial court will be reversed only if there was an abuse of discretion. *State v. Childers*, 80 N.C. App. 236, 244-45, 341 S.E.2d 760, 765-66, *disc. review denied*, 317 N.C. 337, 346 S.E.2d 142 (1986). However, it is unnecessary for us to determine whether an abuse of discretion occurred since defendant *never questioned the jury's behavior at trial*. Under these circumstances, defendant has waived his right to assign error on appeal. N.C.R. App. P. 10; *see also* 66 C.J.S. *New Trial* § 62 (1950). In any event, it is unlikely defendant suffered any prejudice as a result of the alleged jury misconduct. The alleged discussions were reported early in the trial when the jury had heard only a small portion of the evidence, and the trial court gave a lengthy curative instruction prior to the next recess.

IV.

[5] Defendant next contends the trial court erred by not allowing Ms. Veola Stephenson, defendant's supervisor at "Ole," to answer the following question on direct examination:

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In your opinion, with your knowledge of Mr. Najewicz, do you believe he's capable of raping anyone?

According to defendant, this question and the answer thereto should have been allowed as evidence of a *pertinent character trait* under N.C.R. Evid. 404(a)(1). We disagree.

Preliminarily, we observe the record reflects defendant made no proffer of Ms. Stephenson's response. He has thus failed to demonstrate the *content* of the evidence he contends was erroneously excluded, and has failed to preserve this issue for appellate review. N.C.R. Evid. 103(a) mandates:

Error may not be predicated upon a ruling which . . . excludes evidence unless . . . the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.

As our Supreme Court has stated, "[i]t is well established that an exception to the exclusion of evidence cannot be sustained where the record fails to show what the witness' testimony would have been had he been permitted to testify." *State v. Simpson*, 314 N.C. 359, 370, 334 S.E.2d 53, 60 (1985). Defendant argues in his brief, however, "the context of the question makes it obvious what the answer would have been" and therefore no proffer was required. While we may well *infer* what response defendant *anticipated* as opposed to what the witness may *actually* have given, defendant's contention cannot be sustained. Considering a similar situation, the Court in *State v. Satterfield*, 300 N.C. 621, 268 S.E.2d 510 (1980) declined to review the trial court's action in sustaining the prosecutor's objection to defendant's question of a barber as to whether defendant's facial hair growth was fast or slow:

[I]t is impossible on appellate review to determine whether exclusion of this testimony was prejudicial error. 'A showing of the essential content or substance of the witness's testimony is required before this Court can determine whether the error in excluding evidence is prejudicial.' Otherwise stated, '[w]hen evidence is excluded, the record must sufficiently show what the purport of the evidence would have been, or the propriety of the exclusion will not be reviewed on appeal.'

Id. at 628, 268 S.E.2d at 515-16 (citations omitted).

[6] Additionally, assuming *arguendo* the response of the witness would have been "no" rather than in the affirmative or, as is more

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likely, equivocal, other compelling reasons exist for upholding the ruling of the trial court.

First, while a lay witness may testify in the form of an opinion which embraces an ultimate issue to be decided by the jury, N.C.R. Evid. 704; *Mobley v. Hill*, 80 N.C. App. 79, 86, 341 S.E.2d 46, 50 (1986) (incorrectly stated in S.E.2d), a lay opinion must be both (1) rationally based upon the witness' perception and (2) helpful to a clear understanding of the witness' testimony. N.C.R. Evid. 701. In the present case, there is no foundation showing the opinion called for was rationally based upon the perception and observations of the witness, defendant's supervisor. Further, assuming *arguendo* such an opinion would properly be the subject of expert testimony, there is no indication Ms. Stephenson was qualified to testify on such matters as an expert. See *Matheson v. City of Asheville*, 102 N.C. App. 156, 173-74, 402 S.E.2d 140, 150 (1991); *State v. Bowman*, 84 N.C. App. 238, 243-44, 352 S.E.2d 437, 440 (1987).

Second, while opinion testimony may embrace an ultimate issue, the opinion *may not* be phrased using a legal term of art carrying a specific legal meaning not readily apparent to the witness. *State v. Rose*, 327 N.C. 599, 602-04, 398 S.E.2d 314, 315-17 (1990) (expert may not testify defendant was "capable of premeditating"). "Rape" is a legal term of art and accordingly Ms. Stephenson's opinion testimony concerning whether defendant was "capable of rape" was properly excluded. See *State v. Smith*, 315 N.C. 76, 100, 337 S.E.2d 833, 849 (1985).

Based on the foregoing, therefore, we hold the trial court committed no error in sustaining the prosecutor's objection to defendant's opinion question of Ms. Stephenson. In view of this holding, we decline to address the more fundamental question of whether defendant's "capability of rape" even constitutes a "pertinent trait of character" under Rule 404(a)(1).

V.

[7] In his final assignment of error, defendant claims the trial court committed *plain error* by failing to charge the jury the prosecuting witness and her mother were "interested witnesses." Defendant insists the court was required to do so, even without request, since it had instructed two of defendant's witnesses (defendant and his mother) were "interested." This argument is baseless.

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Initially, defendant submitted no request for a special jury instruction to the effect the aforementioned state's witnesses were "interested." In most instances, N.C.R. App. P. 10(b)(2) precludes a party from assigning error to an unobjected-to omitted jury instruction. *State v. Morgan*, 315 N.C. 626, 644, 340 S.E.2d 84, 95 (1986). However, the "plain error" rule allows for appellate review of some assignments of error normally barred by operation of Rule 10(b)(2). *Id.* at 644-45, 340 S.E.2d at 96; N.C.R. App. P. 10(c)(4). Our Supreme Court has explained the plain error rule as follows:

[T]he plain error rule . . . is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is a "*fundamental error*, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done," or "where [the error] is grave error which amounts to a denial of a fundamental right of the accused," or the error has "'resulted in a miscarriage of justice or in the denial to appellant of a fair trial'" or where the error is such as to "seriously affect the fairness, integrity or public reputation of judicial proceedings" or where it can be fairly said "the instructional mistake had a probable impact on the jury's finding that the defendant was guilty."

State v. Odom, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir.), *cert. denied*, 459 U.S. 1018, 74 L.Ed.2d 513 (1982)). In essence, in order to prevail under the plain error rule, defendant must convince this Court that (1) there was error and (2) without this error, the jury would probably have reached a different verdict. *State v. Faison*, 330 N.C. 347, 361, 411 S.E.2d 143, 151 (1991); *State v. Rathbone*, 78 N.C. App. 58, 65, 336 S.E.2d 702, 706 (1985), *disc. review denied*, 316 N.C. 200, 341 S.E.2d 582 (1986).

In the instant case, defendant has failed to show even ordinary prejudicial error, much less "plain error." "[I]nstructions on the credibility of interested witnesses concern a subordinate feature of the case; thus, the court need not instruct on this subject absent a request." *State v. Watson*, 294 N.C. 159, 168, 240 S.E.2d 440, 446 (1978). The court may charge on the status of both defendant and his relatives as interested witnesses without being required to give a similar instruction, without request, as to State's witnesses who may be "interested." *Id.*; *State v. Eakins*, 292 N.C. 445, 449,

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233 S.E.2d 387, 389 (1977) (“[w]e do not believe that the requirement that a defendant must request the desired instruction places an unconscionable burden upon him”).

Our conclusion is strengthened by the fact the jury received the following instruction in the case *sub judice*:

In determining whether to believe *any* witness, you should apply the very same test of truthfulness which you apply in your own ordinary everyday affairs. As applied to this trial, these tests may include . . . [a]ny *interest, bias or prejudice* the witness may have.

(emphasis added). We believe this was sufficient to place the credibility of both the prosecuting witness and her mother before the jury.

No error.

Judges JOHNSON and LEWIS concur.

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COMPANY, DEFENDANT

No. 9219SC498

(Filed 19 October 1993)

1. Insurance § 528 (NCI4th) — automobile accident — underinsured coverage — intrapolicy stacking

The trial court did not err in granting plaintiff’s motion for partial summary judgment allowing plaintiff to engage in intrapolicy stacking of the UIM coverage under his father’s policy. As in *Harrington v. Stevens*, 334 N.C. 586, plaintiff lived in the same household as his father, the owner of the Nationwide policy providing UIM coverage for two vehicles, and is, therefore, a “person insured” under the policy, as defined by G.S. § 20-279.21(b)(3). Thus, he is entitled to the same rights to stack coverages intrapolicy under G.S. § 20-279.21(b)(4) as the owner.

Am Jur 2d, Automobile Insurance § 329.

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Combining or "stacking" uninsured motorist coverages provided in single policy applicable to different vehicles of individual insured. 23 ALR4th 12.

2. Unfair Competition § 1 (NCI3d)— automobile insurance— intrapolicy stacking—refusal to settle—partial release

The trial court erred by dismissing under N.C.G.S. § 1A-1, Rule 12(b)(6) an unfair or deceptive practices claim arising from an alleged bad faith refusal to settle an automobile insurance stacking claim. Although defendant argued that plaintiff's claims were barred by the Conditional Release and Contract executed between plaintiff and defendant at the time defendant made a payment to plaintiff, the language of the Conditional Release and Contract is not ambiguous and the intent of the parties is clear; by its plain language, the Conditional Release and Contract does not bar plaintiff's claims for unfair trade practices and bad faith refusal to settle to the extent that they relate to or arise out of plaintiff's retained claim to the additional UIM coverage for the second automobile listed under his father's policy.

Am Jur 2d, Automobile Insurance § 446; Monopolies, Restraints of Trade, and Unfair Trade Practices § 696.

3. Unfair Competition § 1 (NCI3d)— unfair or deceptive practices—bad faith refusal to settle insurance claim—sufficient claim for relief

Plaintiff's complaint in an action involving intrapolicy stacking of UIM coverage was sufficient to state a claim for relief for unfair trade practices to the extent that its allegations relate to or arise out of defendant Nationwide's refusal to pay the \$100,000 UIM coverage under plaintiff's father's policy for the second of the two automobiles insured under the policy. Plaintiff's allegation that "defendant has adopted a policy and practice in the handling of its first-party insured UIM claims to uniformly contest, and refuse to pay UIM claims which involve 'stacking' of UIM coverages" is sufficient to comport with the requirement of G.S. § 58-63-15(11) that plaintiff allege that defendant violated the prohibited acts "with such frequency as to indicate a general business practice." Additionally, plaintiff alleged other relevant events and circumstances in support of his claims.

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Am Jur 2d, Monopolies, Restraints of Trade, and Unfair Trade Practices § 696.**4. Insurance § 1135 (NCI4th) — automobile insurance — intrapolicy stacking — bad faith refusal to settle**

The trial court erred by dismissing a claim for bad faith refusal to settle an automobile insurance claim involving intrapolicy stacking where plaintiff alleged that defendant breached its duty of good faith in refusing, without reason, to pay plaintiff the full UIM coverage due under the policy and in refusing to effectuate a prompt, fair and equitable settlement of plaintiff's claim when liability was clear. The specific allegations of plaintiff's complaint, if proven, are sufficient to support an award of damages, including punitive damages, based upon a bad faith refusal to pay plaintiff's claim to the extent that such claim relates to or arises out of defendant's alleged bad faith refusal to pay plaintiff the UIM coverage for the second of the two automobiles insured under plaintiff's father's policy.

Am Jur 2d, Insurance § 2009 et seq.

Appeal by plaintiff from order granting motion to dismiss and by defendant from order granting partial summary judgment both entered 4 March 1992 by Judge Thomas W. Seay, Jr. in Rowan County Superior Court. Heard in the Court of Appeals 16 April 1993.

On 28 July 1990, plaintiff was severely injured in an automobile collision caused by the negligence of Richard Grimes. Grimes was insured by defendant Nationwide Mutual Insurance Company ("Nationwide") with policy limits of \$50,000 per person. Nationwide paid plaintiff the full limits of liability under the Grimes policy. The parties have stipulated that plaintiff's damages exceed \$300,000.

At the time of the collision, plaintiff was also the named insured in an automobile policy issued by Nationwide which insured a single automobile owned by plaintiff. That policy provided plaintiff with \$100,000 of underinsured motorist ("UIM") coverage. In addition, Nationwide provided coverage to plaintiff's father, with whom plaintiff was residing at the time of the accident, as the named insured. Plaintiff's father's policy provided UIM coverage in the amount of \$100,000 per person for two vehicles.

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Plaintiff sought payment from Nationwide for the UIM coverage provided by his own policy, and, in addition, sought to "stack" the UIM coverages for each of the vehicles insured by his father's policy. Nationwide tendered payment of the UIM coverage provided by plaintiff's policy and payment of the UIM limits applicable to one vehicle under plaintiff's father's policy, but denied plaintiff's claim for the UIM benefits applicable to the second vehicle insured under the father's policy. Upon payment of the above amounts, the parties entered into a Conditional Release and Contract in which plaintiff reserved his claim against Nationwide for the additional UIM benefits applicable to the second vehicle insured under the father's policy as well as "any claims [plaintiff] might have arising out of Nationwide's refusal to pay said purported additional UIM coverage as demanded by [plaintiff]."

Plaintiff then filed this action for breach of contract contending that he was entitled to receive an additional \$100,000 of UIM coverage for the second vehicle insured under his father's policy. He also sought damages for unfair trade practices as well as punitive damages, alleging that Nationwide had not followed fair claim settlement practices and had breached the duty of good faith which it owed plaintiff.

The trial court entered partial summary judgment for plaintiff on the claim for breach of contract, allowing plaintiff to stack coverage for both vehicles insured under the father's policy, and awarded plaintiff an additional \$100,000. The trial court dismissed, pursuant to G.S. § 1A-1, Rule 12(b)(6), Count II of plaintiff's complaint, which sought damages for defendant's alleged unfair trade practices, and Count III of the complaint which sought punitive damages by reason of defendant's alleged bad faith in refusing to settle the claim. Both parties appeal.

Wallace and Whitley, by Michael Doran, for plaintiff-appellant.

Nichols, Caffrey, Hill, Evans & Murrelle, by Paul D. Coates and ToNola D. Brown, for defendant-appellant.

MARTIN, Judge.

NATIONWIDE'S APPEAL

[1] Nationwide argues that the trial court erred in granting plaintiff's motion for partial summary judgment allowing plaintiff to engage in intrapolicy stacking of the UIM coverage under his father's

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policy. This very same issue has been recently decided by our Supreme Court in *Harrington v. Stevens*, 334 N.C. 586, 434 S.E.2d 212 (1993), under nearly identical facts to those in the present case. The plaintiff in *Harrington*, an adult male who was injured in an automobile collision with a negligent third party, was insured by Nationwide under a policy issued to him. Nationwide had also issued insurance policies to plaintiff's brother and father with whom plaintiff, who was financially independent, resided. The policies issued to plaintiff's father and brother each provided UIM coverage for two vehicles in the amounts of \$50,000 per person and \$100,000 per accident. The plaintiff sought to stack the four coverages under those two policies for a total UIM pool of \$200,000. The Supreme Court held that the provisions of G.S. § 20-279.21(b)(3) and (4) in effect at the time of the accident require that "the plaintiff be allowed to stack, both interpolicy and intrapolicy, the underinsured motorist coverages of the policies of his brother and his father." *Harrington*, 334 N.C. at 591-92, 434 S.E.2d at 214.

Like the plaintiff in *Harrington*, the plaintiff in the present case lived in the same household as his father, the owner of the Nationwide policy providing UIM coverage for two vehicles. Plaintiff is, therefore, a "person insured" under the policy, as defined by G.S. § 20-279.21(b)(3). Thus, he is entitled to the same rights to stack coverages intrapolicy under G.S. § 20-279.21(b)(4) as the owner. The trial court properly granted partial summary judgment permitting plaintiff to stack the UIM coverages on multiple vehicles insured under the policy which Nationwide issued to his father. Defendant's assignments of error related thereto are overruled.

PLAINTIFF'S APPEAL

[2] Plaintiff contends that the trial court erred by dismissing, pursuant to G.S. § 1A-1, Rule 12(b)(6), Counts II and III of his complaint by which he sought to recover damages for unfair trade practices and punitive damages for defendant's alleged bad faith refusal to settle his claim. Under Rule 12(b)(6), a claim should be dismissed where it appears that plaintiff is not entitled to relief under any set of facts which could be proven. *Garvin v. City of Fayetteville*, 102 N.C. App. 121, 401 S.E.2d 133 (1991). This occurs where there is a lack of law to support a claim of the sort made, an absence of facts sufficient to make a good claim, or the disclosure of some fact which will necessarily defeat the claim. *Id.* In analyzing the sufficiency of the complaint under Rule 12(b)(6), the complaint

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must be liberally construed. *Dixon v. Stuart*, 85 N.C. App. 338, 354 S.E.2d 757 (1987). The question for the court is whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory, whether properly labeled or not. *Harris v. NCNB*, 85 N.C. App. 669, 355 S.E.2d 838 (1987). To prevent a dismissal under this rule, a party must (1) give sufficient notice of the events on which the claim is based to enable the adverse party to respond and prepare for trial, and (2) state enough to satisfy the substantive elements of at least some legally recognized claim. *Hewes v. Johnston*, 61 N.C. App. 603, 604, 301 S.E.2d 120, 121 (1983).

Defendant argues first that plaintiff's claims as set forth in Counts II and III of his complaint were barred by the Conditional Release and Contract executed between plaintiff and defendant at the time defendant made the \$150,000 payment to plaintiff. The significant portions of the Conditional Release and Contract, which was attached to the complaint, provide:

Whereas, except for the parties' dispute concerning the purported additional \$100,000.00 of UIM coverage under the aforesaid policies, the parties have agreed to a payment of \$150,000.00 in UIM coverage to Miller in exchange for a release of Nationwide's liability under the aforesaid policies of insurance arising out of the aforesaid accident;

. . .

2. Miller hereby . . . does forever release and discharge Nationwide of and from all claims of whatsoever kind and nature prior to and including the date hereof growing out of the UIM coverage for one of the two automobiles insured under Automobile Insurance Policy number 61-32B-240-542 issued by Nationwide to Sammy E. Miller, and resulting or to result from an automobile accident which occurred on July 28, 1990 at or near Salisbury, Rowan County, North Carolina.

3. That Miller does NOT release Nationwide, and Nationwide agrees that Miller may prosecute his claim for additional UIM coverage against Nationwide for the second of the two automobiles insured under Automobile Insurance Policy number 61-32B-240-542 issued by Nationwide to Sammy E. Miller along with any claims Miller might have arising out of Nationwide's

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refusal to pay said purported additional UIM coverage as demanded by Miller.

Generally a release executed by an injured party based on valuable consideration is a complete defense to an action for damages for such injuries. *Cunningham v. Brown*, 51 N.C. App. 264, 276 S.E.2d 718 (1981), *appeal after remand*, 62 N.C. App. 239, 302 S.E.2d 822, *disc. review denied*, 308 N.C. 675, 304 S.E.2d 754 (1983). What a release means depends upon the executing parties' intent which is determined from the language used, the parties' situation and the objectives they sought to accomplish. *McGladrey, Hendrickson & Pullen v. Syntek Fin.*, 92 N.C. App. 708, 375 S.E.2d 689, *disc. review denied*, 324 N.C. 433, 379 S.E.2d 243 (1989). When the circumstances surrounding the execution of the release are not in dispute and its terms are free from ambiguity, its meaning is for the court to determine. *Id.*

The language of the Conditional Release and Contract as set forth above is not ambiguous and the intent of the parties is clear. Plaintiff specifically released all claims related to the UIM coverage for the first vehicle covered under the Miller policy. However, plaintiff specifically retained "his claim for additional UIM coverage . . . for the second of the two automobiles . . . along with any claims . . . arising out of Nationwide's refusal to pay said purported additional UIM coverage as demanded by Miller." Therefore, by its plain language the Conditional Release and Contract does not bar plaintiff's claims for unfair trade practices and bad faith refusal to settle to the extent that they relate to or arise out of plaintiff's retained claim to the additional UIM coverage for the second automobile listed under the Miller policy.

[3] To prevail on a claim for unfair and deceptive trade practices, one must show: (1) an unfair or deceptive act or practice, or unfair method of competition, (2) in or affecting commerce, and (3) which proximately caused actual injury to the plaintiff or his business. *Spartan Leasing v. Pollard*, 101 N.C. App. 450, 460, 400 S.E.2d 476, 482 (1991). A practice is unfair when it offends established public policy and when the practice is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers. *Johnson v. Beverly-Hanks & Assoc.*, 328 N.C. 202, 208, 400 S.E.2d 38, 42 (1991). "If a party engages in conduct that results in an inequitable assertion of his power or position, he has committed an unfair act or practice." *Id.* Evidence of negligence, good faith or lack of intent

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are not defenses to an action under G.S. § 75-1.1. *Forbes v. Par Ten Group, Inc.*, 99 N.C. App. 587, 394 S.E.2d 643 (1990), *disc. review denied*, 328 N.C. 89, 402 S.E.2d 824 (1991).

The insurance business is definitely one "in commerce" as an "exchange of value" occurs when a consumer purchases a policy. *Pearce v. American Defender Life Ins. Co.*, 316 N.C. 461, 469, 343 S.E.2d 174, 179 (1986). Unfair or deceptive trade practices in the insurance industry are governed by G.S. § 58-63-15. *Bentley v. N.C. Insurance Guaranty Assn.*, 107 N.C. App. 1, 418 S.E.2d 705 (1992). A violation of G.S. § 58-63-15 constitutes an unfair and deceptive trade practice in violation of G.S. § 75-1.1 as a matter of law. *Pearce*, 316 N.C. at 470, 343 S.E.2d at 179 (construing G.S. § 58-54.4, the predecessor to G.S. § 58-63-15); *Jefferson-Pilot Life Ins. Co. v. Spencer*, 110 N.C. App. 194, 429 S.E.2d 583, *disc. review allowed*, 334 N.C. 434, 433 S.E.2d 176 (1993). "The relationship between the insurance statute and the more general unfair or deceptive trade practices statutes is that the latter provide a remedy in the nature of a private action for the former." *Kron Medical Corp. v. Collier Cobb & Associates*, 107 N.C. App. 331, 335, 420 S.E.2d 192, 194, *disc. review denied*, 333 N.C. 168, 424 S.E.2d 910 (1992), *reconsideration dismissed*, 333 N.C. 345, 426 S.E.2d 706 (1993).

Plaintiff relies specifically on G.S. § 58-63-15(11) (f, h, m and n) which provide as follows:

(11) Unfair Claim Settlement Practices.—Committing or performing with such frequency as to indicate a general business practice of any of the following: Provided, however, that no violation of this subsection shall of itself create any cause of action in favor of any person other than the Commissioner:

- f. Not attempting in good faith to effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear;
- h. Attempting to settle a claim for less than the amount to which a reasonable man would have believed he was entitled;
- m. Failing to promptly settle claims where liability has become reasonably clear, under one portion of the insurance policy coverage in order to influence settlements under other portions of the insurance policy coverage; and

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- n. Failing to promptly provide a reasonable explanation of the basis in the insurance policy in relation to the facts or applicable law for denial of a claim or for the offer of a compromise settlement.

We conclude that plaintiff's complaint is sufficient to state a claim for relief for unfair trade practices to the extent that its allegations relate to or arise out of Nationwide's refusal to pay the \$100,000 UIM coverage under the Miller policy for the second of the two automobiles insured under the policy. Plaintiff specifically alleged that "defendant has adopted a policy and practice in the handling of its first-party insured UIM claims to uniformly contest, and refuse to pay UIM claims which involve 'stacking' of UIM coverages." This is sufficient to comport with the requirement of G.S. § 58-63-15(11) that plaintiff allege that defendant violated the prohibited acts "with such frequency as to indicate a general business practice." *Belmont Land and Inv. v. Standard Fire Ins. Co.*, 102 N.C. App. 745, 403 S.E.2d 924 (1991). Additionally, plaintiff alleged the following relevant events and circumstances in support of his claims for unfair trade practices:

19. That the plaintiff provided defendant with records substantiating medical expenses in excess of \$98,000 arising out of the injuries sustained by plaintiff in the aforesaid accident as early as February 26, 1991, which documentation also provided clear indication that plaintiff's injuries were not only severe and extensive but also permanent and disabling to a significant degree.

. . .

21. As of April 5, 1991, defendant had sufficient information to determine that a substantial portion, if not all, of the UIM coverages available to plaintiff as an insured, would be properly due and payable to plaintiff; nevertheless, from and after April 5, 1991, through and including September 11, 1991, defendant unreasonably withheld payments of any funds due under the UIM coverage available to Miller.

22. That in refusing to pay any sums under the UIM coverages available to plaintiff, as defendant's insured, defendant first claimed not to have sufficient information to determine the extent of plaintiff's damages.

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23. That by letter dated July 8, 1991, plaintiff provided the defendant with substantial additional documentation to reconfirm that plaintiff's damages exceed the sum of \$300,000, which letter included a demand that defendant immediately pay its full UIM coverage limits to plaintiff.

24. That between July 8, 1991 and September 11, 1991, the defendant withheld payment of \$150,000 of the remaining funds it acknowledged was due plaintiff in an effort to coerce plaintiff into relinquishing his claim for the additional \$100,000.

25. That after September 11, 1991, defendant has continued to refuse payment of the additional \$100,000 due plaintiff without just cause or excuse.

26. That, in refusing to pay plaintiff the additional \$100,000 due under the aforesaid UIM coverage, the defendant has failed to identify any policy provision and defendant has cited no case law or statutory authority that supports its refusal to pay the additional \$100,000 due plaintiff under the aforesaid UIM coverage; on the other hand, plaintiff has repeatedly cited to defendant numerous cases, and forwarded a memorandum of law to the defendant, in support of plaintiff's claim to the additional \$100,000 due, as aforesaid.

27. That, upon information and belief, the defendant has adopted a policy and practice in the handling of its first-party insured UIM claims to uniformly contest, and refuse to pay UIM claims which involve a 'stacking' of UIM coverages.

28. That the aforesaid policy and practice of the defendant, upon information and belief, has been invoked on an "across-the-board" basis, without regard to its duty of good faith owed to first-party insureds and with the intent either to create a proliferation of litigation by such insureds or to unfairly coerce such insureds to abandon their legitimate claims to such additional coverage because of the prospect of expensive, protracted litigation.

. . .

30. That, upon information and belief, the defendant has persisted with said policy and practice in the handling of plaintiff's claim, as heretofore alleged, without regard to the specific facts or merits of plaintiff's claim, without regard to the ex-

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press provisions of its insurance policies applicable herein and issued to plaintiff, without regard to recent decisions of the appellate courts, and in total disregard of its duty of good faith owed to plaintiff in the handling of plaintiff's claim.

The facts alleged by plaintiff are sufficient to state a claim for unfair trade practices so as to withstand a challenge under Rule 12(b)(6). For this reason, the trial judge erred in dismissing plaintiff's claim for unfair trade practices.

[4] Plaintiff also contends that Count III of his complaint was sufficient to allege a claim for bad faith refusal to settle and to support an award of punitive damages. In addition to the allegations concerning defendant's refusal to pay the additional UIM benefits which we have recited above, the plaintiff alleged:

36. That defendant's violation of its duty of good faith owed to plaintiff has been intentional, wilful, oppressive, unscrupulous, and in reckless disregard of plaintiff's right to recover the sums due under said policy of insurance, such that defendant should be assessed with, and plaintiff should recover an award for, punitive damages in excess of Ten Thousand (\$10,000.00) Dollars.

Generally, punitive damages are not recoverable for breach of contract, except for a breach of a contract to marry. However, when the breach is accompanied by identifiable tortious conduct and by some element of aggravation, punitive damages may be available. *Dailey v. Integon Ins. Corp.*, 57 N.C. App. 346, 291 S.E.2d 331 (1982), *appeal after remand*, 75 N.C. App. 387, 331 S.E.2d 148, *disc. review denied*, 314 N.C. 664, 336 S.E.2d 399 (1985). This is true even if the tort constitutes or accompanies a breach of contract. *Von Hagel v. Blue Cross and Blue Shield*, 91 N.C. App. 58, 370 S.E.2d 695 (1988). "Aggravation" has been defined to include fraud, malice, such a degree of negligence as indicates a recklessness indifference to plaintiff's rights, oppression, insult, rudeness, caprice, and willfulness. *Newton v. Insurance Co.*, 291 N.C. 105, 112, 229 S.E.2d 297, 301 (1976). A bad faith refusal to provide insurance coverage or to pay a justifiable claim may give rise to a claim for punitive damages. *Von Hagel, supra*. We have held in the past that where plaintiff's allegations that a defendant has acted in bad faith accompanied by willful and malicious conduct are supported by specific examples, plaintiff has sufficiently alleged a tortious act accompanied by the requisite element of "aggravation."

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Id.; *Dailey, supra*; *Payne v. N.C. Farm Bureau Mut. Ins. Co.*, 67 N.C. App. 692, 313 S.E.2d 912 (1984). The facts and allegations in the complaint must be sufficient to prevent confusion and surprise to the defendant and to preclude recovery of punitive damages for breach of contract where tortious conduct does not accompany the breach. *Shugar v. Guill*, 304 N.C. 332, 283 S.E.2d 507 (1981). It is for the trier of fact to determine whether the alleged facts rise to the level of aggravated conduct necessary to support a claim for punitive damages. *Smith v. Nationwide Mutual Fire Ins. Co.*, 96 N.C. App. 215, 385 S.E.2d 152 (1989), *disc. review denied*, 326 N.C. 365, 389 S.E.2d 816 (1990). "An insurance company is expected to deal fairly and in good faith with its policyholders." *Robinson v. N.C. Farm Bureau Ins. Co.*, 86 N.C. App. 44, 50, 356 S.E.2d 392, 395 (1987), *disc. review denied*, 321 N.C. 592, 364 S.E.2d 140 (1988).

Based on the allegations in plaintiff's complaint as set forth above, we conclude that plaintiff has sufficiently alleged a tortious act accompanied by some element of aggravation. Plaintiff alleged that defendant breached its duty of good faith in refusing, without reason, to pay plaintiff the full UIM coverage due under the Miller policy and in refusing to effectuate a prompt, fair and equitable settlement of plaintiff's claim when liability was clear. Plaintiff specifically alleged that in refusing to pay sums due plaintiff under the Miller policy, defendant first claimed not to have sufficient information to determine the extent of plaintiff's damages, but that when plaintiff provided defendant with substantial additional documentation, defendant continued to refuse payment. Plaintiff alleged further that defendant withheld payment of \$150,000 in remaining funds it acknowledged were due plaintiff in an effort to coerce plaintiff to relinquish his claim for an additional \$100,000. Plaintiff also alleged that defendant failed to cite any case law or statutory authority to support its refusal to pay plaintiff, and that defendant has adopted an "across-the-board" policy and practice in the handling of its first-party insured UIM claims to uniformly contest, and refuse to pay UIM claims which involve a "stacking" of UIM coverages, in total disregard of the applicable policy provisions. These allegations of plaintiff's complaint, if proven, are sufficient to support an award of damages, including punitive damages, based upon a bad faith refusal to pay plaintiff's claim to the extent that such claim relates to or arises out of defendant's alleged bad-faith refusal to pay plaintiff the UIM coverage for the second of

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the two automobiles insured under the Miller policy. Therefore dismissal of Count III of plaintiff's complaint was error.

In summary, we affirm the entry of partial summary judgment in plaintiff's favor with respect to the relief sought in Count I of the complaint. However, we must vacate the order dismissing Counts II and III of the complaint and remand the case to the Superior Court of Rowan County for further proceedings.

Plaintiff's appeal—Vacated and Remanded.

Defendant's appeal—Affirmed.

Judges EAGLES and JOHN concur.

STEPHEN TAYLOR ALT v. JAMES E. PARKER, M.D., PETER IRIGARAY,
M.D., AND B. GENE BARRETT

No. 9218SC909

(Filed 19 October 1993)

1. Malicious Prosecution § 17 (NCI4th)— AIDS patient spitting at doctor—assault charges—conviction of lesser included offense—not termination in plaintiff's favor

The trial court did not err by granting summary judgment for defendants on a malicious prosecution claim where plaintiff, an HIV positive patient at a state mental hospital, became upset and threw his dinner tray against the wall of the ward where he was staying; a technician reported plaintiff's behavior to a nurse, who ordered that plaintiff be placed in seclusion and restraints and called defendant Parker, a doctor; Dr. Parker authorized the use of seclusion and restraint for up to eight hours, until plaintiff could contract not to harm himself or others; plaintiff was monitored at fifteen-minute intervals and was given toileting privileges, which he refused; Dr. Parker visited plaintiff but was unable to talk with him because plaintiff was shouting and cursing at him; Dr. Parker authorized further restraint; plaintiff continued to be verbally abusive to the nurses and technicians attending him through the night; public safety officers were called to assist six technicians in

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cleaning plaintiff and changing his clothes and bedding; Parker went to see plaintiff the next morning; plaintiff spat upon Parker and a social worker accompanying him; Parker subsequently contacted the Butner police and plaintiff was arrested and indicted for assault with a deadly weapon with intent to kill; the charge of assault with a deadly weapon with intent to kill was dismissed; and plaintiff pleaded guilty to three charges of simple assault. For purposes of a claim for malicious prosecution, conviction of a lesser included offense of the charge initiated by the defendant is not a termination in the plaintiff's favor.

Am Jur 2d, Malicious Prosecution §§ 139-190.**2. False Imprisonment § 8 (NCI4th)— restraint at mental institution—professional judgment and proper procedures—evidence insufficient**

Plaintiff's forecast of evidence on a false imprisonment claim arising from the involuntary restraint of plaintiff in Butner Hospital was insufficient to create a genuine issue of material fact as to whether defendants followed the requisite procedures or whether the decision to restrain plaintiff was an exercise of professional judgment. Persons who are responsible for the treatment of clients in state institutions are entitled to a qualified privilege under N.C.G.S. § 122C-210.1 (1989); so long as the requisite procedures were followed and the decision to restrain the plaintiff was an exercise of professional judgment, the defendants are not liable to the plaintiff for their actions. Plaintiff's contentions that procedures were not followed in that his behavior was under control and that lesser measures were not considered were rejected. Plaintiff's contention that defendant Parker's determinations were so far removed from professional standards as not to be an exercise of professional judgment was based primarily on the deposition testimony of an expert, which represented only another professionally acceptable choice.

Am Jur 2d, False Imprisonment §§ 33-37.

False imprisonment in connection with confinement in nursing home or hospital. 4 ALR4th 449.

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3. State § 4.2 (NCI3d)— patient in mental hospital restrained— claim for deprivation of due process against doctors— no right to recover

The trial court did not err by granting summary judgment for defendants on a claim for deprivation of due process rights arising from his involuntary restraint while in a state mental hospital. Plaintiff had no cause of action in this case against defendants in their individual capacities; North Carolina does not recognize a direct cause of action for monetary damages against a state official in his individual capacity who allegedly violated a plaintiff's state constitutional rights. Although one whose state constitutional rights have been offended has a direct action against governmental defendants who allegedly violated those rights in their official capacities in the absence of an adequate state remedy, plaintiff's claim for deprivation of due process is an attempt to vindicate his right to be free from restraint, which is the same interest protected by his common law claim for false imprisonment. Furthermore, plaintiff had another avenue available to him in the administrative grievance procedure provided for in the DHR Rules.

Am Jur 2d, Public Officers and Employees § 366.

Appeal by plaintiff from order entered 10 June 1992 by Judge William H. Freeman in Guilford County Superior Court. Heard in the Court of Appeals 1 September 1993.

Plaintiff, who was a voluntarily admitted patient at a state mental hospital and who is HIV positive, sued the defendants, doctors and officials at the hospital, both personally and in their official capacities, for alleged violations of his rights under the United States Constitution, the North Carolina Constitution and the North Carolina Client's Rights Act, N.C. Gen. Stat. §§ 122C-51 to -67 (1989 and Supp. 1992), and for false imprisonment and malicious prosecution. The suit was removed to federal court, but was remanded to the Guilford County Superior Court after all of the federal claims were dismissed. Defendants filed a motion for summary judgment as to all the claims, which was granted on 10 June 1992. From this order, plaintiff appeals.

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Carolina Legal Assistance, by Deborah Greenblatt, for plaintiff-appellant.

Attorney General Lacy H. Thornburg, by Special Deputy Attorney General Michelle B. McPherson, for defendant-appellees.

MCCRODDEN, Judge.

Plaintiff argues that the trial court erroneously entered summary judgment on his three remaining claims, malicious prosecution, false imprisonment, and deprivation of due process, because he presented evidence that created a genuine issue of material fact as to each of these claims. For the following reasons, we find that the trial court properly entered summary judgment as to each of plaintiff's claims.

Under Rule 56 of the N.C. Rules of Civil Procedure, summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (1990). Defendants were thus entitled to summary judgment if they could establish either the nonexistence of an essential element of plaintiff's claim or show that plaintiff could not produce evidence of an essential element of his claim. *Mitchell v. Golden*, 107 N.C. App. 413, 417, 420 S.E.2d 482, 484 (1992), *aff'd*, 330 N.C. 570, 429 S.E.2d 348 (1993).

The record discloses the following. On 20 November 1989, plaintiff was involuntarily admitted to the John Umstead Hospital (the Hospital) in Butner, North Carolina, a state psychiatric hospital, after he claimed to have taken an overdose of Tylenol. Defendant Dr. James Parker (Parker) was assigned to be plaintiff's treating psychiatrist and to coordinate all of plaintiff's medical and psychiatric treatment. During the course of plaintiff's medical treatment it was discovered that plaintiff was infected with the Human Immunodeficiency Virus.

In January 1990, at plaintiff's request, he was voluntarily admitted to the Hospital to obtain treatment for addiction to alcohol and his involuntary commitment was discharged. As part of his treatment for substance abuse, plaintiff received vocational rehabilitation counseling from Carol High (High), a social worker assigned to the Hospital. Plaintiff's treatment team, including High, attempted

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to find suitable employment and housing for plaintiff. They eventually found suitable housing and set up several job interviews for plaintiff. On 22 February 1990, plaintiff refused to attend a job interview because he did not like the hospital employee who had been assigned to transport him to the interview. After learning of plaintiff's refusal to attend the interview, Parker and High requested a meeting with plaintiff to discuss his plans for discharge and to inform him of some test results. Plaintiff was quite upset from the outset because he did not wish High to be present at the meeting. During this meeting, Parker informed plaintiff that results of certain lab tests indicated that his HIV infection might be symptomatic. Plaintiff would not discuss his refusal to attend the job interview and demanded that he be released. Parker told plaintiff that his cooperation was essential to his treatment and that if he would not cooperate he would be discharged. After the meeting Parker and High made plans to discharge plaintiff on the following day. Parker wrote discharge orders at approximately 5:00 p.m. High visited plaintiff again and presented him with a copy of his post-institutional plan, which plaintiff tore up and threw on the floor.

Around 5:25 p.m., plaintiff threw his dinner tray against the wall of the ward in which he was staying. An on-duty health care technician reported plaintiff's behavior to Carolyn DeBerry, a registered nurse, who then ordered that plaintiff be placed in seclusion and restraints. DeBerry then called Parker who was at that point working in the hospital admissions office. DeBerry described plaintiff's actions to Parker, who then authorized the use of seclusion and restraints for up to eight hours, until plaintiff could contract not to harm himself or others. Plaintiff remained in four-point leather restraints throughout the night. He was monitored at fifteen-minute intervals and was given regular toileting privileges, which he refused.

At 11:40 p.m., when he had finished his work at the admissions desk, Parker visited plaintiff in the seclusion room. Parker was unable to talk with plaintiff about his earlier behavior or his release because plaintiff was shouting and cursing at him. As a result of plaintiff's refusal to contract not to harm himself or others, Parker authorized another eight-hour interval of restraint, under the same condition for release. Through the night plaintiff continued to be verbally abusive to the nurses and health care technicians attending to him, and he struggled against the restraints.

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Although he had urinated and defecated on himself, he refused to take a shower, insisting that he wanted the patient advocate to see him in that state. He threatened to spit on and throw feces on anyone who attempted to clean him. Finally, the nurse on duty had to call Butner public safety officers to assist six health care technicians in cleaning plaintiff and changing his clothes and bedding. Plaintiff violently resisted these efforts.

At approximately 9:30 a.m. on 23 February 1990, Parker and High went to see plaintiff again. Plaintiff said that he would not speak to Parker while High was present. Parker insisted that High needed to be present since she was a member of the treatment team. Plaintiff then spat upon Parker and High. Some of plaintiff's sputum hit Parker in the face and went into his eyes. Parker then left the plaintiff and placed a telephone call to the Center for Disease Control. He was informed that there had never been a documented case of transmission of HIV through saliva. After discussing the matter with High and his supervisor, Dr. Joseph McEvoy, Parker then contacted the Butner police. An officer came to the Hospital and interviewed Parker. Afterward, the officer took Parker to a magistrate, to whom he related the events of that morning. The magistrate issued a warrant for plaintiff's arrest for assault with a deadly weapon with intent to kill. Plaintiff was subsequently arrested and taken into custody.

In April 1990, a Granville County grand jury returned a true bill of indictment of plaintiff on the charge of assault with a deadly weapon with intent to kill. On 18 April 1990, upon a motion of habeas corpus, plaintiff appeared before Judge Howard Manning in Granville County Superior Court. Judge Manning determined that the plaintiff's saliva was not a deadly weapon, as a matter of law, and dismissed the charge of assault with a deadly weapon with intent to kill. Then, pursuant to a plea arrangement, plaintiff pleaded guilty to three charges of simple assault. The court sentenced plaintiff to time he had already served. Plaintiff filed this action on 15 June 1990.

[1] Plaintiff first argues that there was a genuine issue of material fact as to each element of his claim for malicious prosecution. The elements of a claim for malicious prosecution are (1) initiation by the defendant of an earlier proceeding; (2) lack of probable cause for such initiation; (3) malice, either actual or implied; and (4) ter-

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mination of the earlier proceeding in favor of the plaintiff. *Jones v. Gwynne*, 312 N.C. 393, 397, 323 S.E.2d 9, 11 (1984).

It is undisputed that defendant Parker initiated a criminal proceeding against plaintiff when he swore out the warrant for assault with a deadly weapon. We do not address the questions of whether Parker had probable cause or whether he acted with malice because we find that plaintiff's claim falls short on the fourth element.

"Ordinarily the termination of the proceeding must result in a discharge of the plaintiff so that new process must issue in order to revive the proceeding against him." *Id.* at 400, 323 S.E.2d at 13. Plaintiff's indictment for assault with a deadly weapon with intent to kill included all lesser offenses. Plainly, simple assault is a lesser included offense of assault with a deadly weapon with intent to kill, N.C. Gen. Stat. §§ 14-32, -33 (1986 and Supp. 1992), and no new process need be issued for a conviction on a lesser included offense. N.C. Gen. Stat. § 15-170 (1983). Pursuant to the plea bargain, plaintiff entered a plea of guilty to assault. We hold that, for purposes of a claim for malicious prosecution, conviction of a lesser included offense of the charge initiated by the defendant is not a termination in the plaintiff's favor. Consequently, we overrule plaintiff's first argument.

[2] Plaintiff next argues that there was a genuine issue of material fact as to his claim for false imprisonment. The essence of the tort of false imprisonment is illegal restraint of a person against his will. *Myrick v. Cooley*, 91 N.C. App. 209, 212, 371 S.E.2d 492, 494, *disc. review denied*, 323 N.C. 477, 373 S.E.2d 865 (1988). In this case it is clear that plaintiff was lawfully restrained. A client in a state institution is not entitled to absolute freedom from restraint; rather, the client's freedom from restraint must be balanced against the safety of other clients and the client himself. *See Youngberg v. Romeo*, 457 U.S. 307, 73 L.Ed.2d 28 (1982).

Persons who are responsible for the treatment of clients in state institutions are entitled to a qualified privilege under N.C. Gen. Stat. § 122C-210.1 (1989), which provides that:

No facility or any of its officials, staff, or employees, or any physician or other individual who is responsible for the examination, management, supervision, treatment, or release of a client and who follows accepted professional judgment, prac-

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tice, and standards is civilly liable, personally or otherwise, for actions arising from these responsibilities or for actions of the client.

In *Youngberg*, the United States Supreme Court addressed the issue of what 14th Amendment liberty interests a client in a state hospital retained. The Court found that a client is entitled to some, but not complete, freedom from bodily restraint, *id.* at 319-20, 73 L.Ed.2d at 39, and stated that in deciding whether to restrain clients, the administrators and professional staff of state hospitals "should not be required to make each decision in the shadow of an action for damages." *Id.* at 325, 73 L.Ed.2d at 43. The Court adopted the standard of review that had been postulated in a concurring opinion of the lower court: "the Constitution only requires that the courts make certain that professional judgment in fact was exercised. It is not appropriate for the courts to specify which of several professionally acceptable choices should have been made." *Id.* at 321, 73 L.Ed.2d at 41.

Since we are today concerned with the provisions of the North Carolina Constitution, the U.S. Supreme Court's opinion has no direct precedential weight. Nonetheless, we believe that its reasoning is sound and coincides with our reading of N.C.G.S. § 122C-210.1, and we adopt the standard enunciated in *Youngberg*. Thus, in this case, so long as the requisite procedures were followed and the decision to restrain the plaintiff was an exercise of professional judgment, the defendants are not liable to the plaintiff for their actions. Plaintiff alleges both that Parker failed to follow the established procedures and that he did not exercise his professional judgment in deciding to restrain plaintiff.

In this instance, the applicable procedures and regulations come from three sources, the General Statutes, the North Carolina Administrative Code and the official policies of the Hospital. First, "[p]hysical restraint or seclusion of a client shall be employed only when there is imminent danger of abuse or injury to himself or others, when substantial property damage is occurring, or when the restraint or seclusion is necessary as a measure of therapeutic treatment." N.C.G.S. § 122C-60.

The Department of Human Resources rules (DHR Rules), adopted pursuant to N.C.G.S. § 122C-60(b), provide that a client in restraint or seclusion shall be released when he no longer demonstrates the behavior which precipitated the restraint. 10

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N.C.A.C. 14J .0204(k) (March 1990). The DHR Rules also require state hospitals to develop procedures and policies for the use of restraint or seclusion that provide, at a minimum:

(1) [a] process for identifying and privileging state facility employees who are authorized to use such interventions;

(2) provisions that a qualified or responsible professional shall:

(A) review the use of the intervention as soon as possible but at least within one hour of the initiation of its use;

(B) verify the inadequacy of less restrictive intervention techniques; and

(C) document in the client record evidence of approval or disapproval of continued use.

10 N.C.A.C. 14J .0204(d) (March 1990). At the relevant time, the Hospital had in place procedures which met all of the requirements of the DHR Rules, and further required that a registered nurse who orders seclusion or restraint must immediately obtain an order from the client's physician. An order for seclusion or restraint must indicate the reason for restraint, the estimated duration of the restraint and the behavioral criteria for release.

Plaintiff has argued that Parker failed to follow the procedures by failing to verify the inadequacy of lesser measures. However, the DHR Rules require that a qualified professional verify the inadequacy. Nurse DeBerry is a qualified professional within the definition of that term contained in the DHR Rules. 10 N.C.A.C. 14G .0102(b)(32) (June 1990). Nurse DeBerry testified that she did not discuss lesser measures with Parker because she was unable to reason with the plaintiff and he was out of control. Thus, she had verified to her own satisfaction that lesser measures were inadequate. Furthermore, Parker testified that if DeBerry had suggested lesser measures, he would have rejected such a suggestion because of plaintiff's history of suicide threats and attempts. We reject plaintiff's contention that lesser measures were not considered in his case.

Plaintiff also argues that the procedures were violated because his behavior was under control and he should have been released. Since we deem the condition set on plaintiff's release to be imminently reasonable, we reject this contention. Plaintiff could not, or would not, contract not to harm himself. Given plaintiff's history

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of suicide threats and attempts, we see no reason to find that Parker should have determined that plaintiff had gained behavioral control when he refused to contract not to harm himself. In any event, the determinations of whether to restrain a client and whether a client has gained behavioral control sufficient to be released are precisely the types of determinations which should not be subject to second guessing by judges or juries and to which the qualified privilege of N.C.G.S. § 122C-210.1 applies.

Plaintiff, however, argues further that the determinations made by Parker were not exercises of professional judgment, *i.e.*, they were so far removed from the professional standards as not to be an exercise of professional judgment. As support for this argument, he relies primarily on the deposition testimony of an expert witness, who stated that defendant Parker did not exercise professional judgment for a number of reasons: first, plaintiff was placed in seclusion and restraint for reasons other than being a danger to himself or others; second, alternative measures were not considered or used; third, plaintiff was allowed to remain in seclusion and restraint for an extended period of time; and finally Parker relied on second-hand information from Nurse DeBerry in authorizing the use of restraint and did not visit plaintiff for at least six hours.

Taking these assertions in turn we find them to be meritless. First, from the scant excerpts of the deposition contained in the record on appeal, we cannot determine what the expert thought the other reasons for the restraint might be. Second, while less drastic measures were not actually discussed by Dr. Parker and Nurse DeBerry, it is clear that such discussions were rendered moot by the inability of the plaintiff to listen to reason. Third, the expert's opinion that plaintiff was allowed to remain in restraints for too long is vitiated by the fact that hospital procedure allows restraint up to eight hours, after which time a new order must be issued. Finally, Hospital policy clearly allows for an order of restraint to be based on second-hand information and also only requires that the physician visit a restrained client within eight hours of the restraint, which Parker certainly did. The Hospital is accredited by the Joint Commission on Accreditation of Hospitals. Such accreditation is *prima facie* proof of constitutionally permissible conditions. *Thomas S. v. Brooks*, 902 F.2d 250, 253, *cert. denied*, 498 U.S. 451, 112 L.Ed.2d 335 (4th Cir. 1990). We believe that, at best, the testimony of plaintiff's expert represents only another "professionally acceptable choice."

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We find that the forecast of evidence provided by the plaintiff was insufficient to create a genuine issue of material fact as to whether defendants followed the requisite procedures or whether Parker's decision to restrain plaintiff was an exercise of professional judgment. Thus, the restraint of plaintiff was lawful and the plaintiff's claim for false imprisonment is fatally deficient. Accordingly, we overrule plaintiff's second argument.

[3] Plaintiff also contends that the trial court erred in dismissing the claim of deprivation of due process rights against the doctors. Plaintiff argues that he was deprived of the liberty guaranteed by the "law of the land" when he was placed in restraints and seclusion. N.C. Const. art. I, § 19.

As a threshold question, in order to bring a claim against state officials for constitutional violations a plaintiff must show that he has a right to recover directly from the officials. In this case it is clear that plaintiff had no right to recover against the defendants in either their individual or official capacities.

North Carolina does not recognize a direct cause of action for monetary damages against a state official in his individual capacity, who allegedly violated a plaintiff's state constitutional rights. *Corum v. University of North Carolina*, 330 N.C. 761, 787, 413 S.E.2d 276, 292, *cert. denied*, 506 U.S. ---, 121 L.Ed.2d 431 (1992). The state constitution is meant to protect the rights of individuals from infringement by the State, not to protect those rights as against other individuals. *Id.* at 788, 413 S.E.2d at 293. Plaintiff had no cause of action in this case against defendants in their individual capacity.

However, one whose state constitutional rights have been offended has a direct action against governmental defendants who allegedly violated those rights, in their official capacities, "[i]n the absence of an adequate state remedy." *Corum*, 330 N.C. at 782, 413 S.E.2d at 289. In *Corum*, the interest that was at stake was the plaintiff's right to free speech, under the Declaration of Rights of Article 1 of the North Carolina Constitution. Our Supreme Court held that the plaintiff had an action for the violation of that right, since there was no other adequate redress. In this case however, plaintiff's claim for deprivation of due process is an attempt to vindicate his right to be free from restraint, which is the same interest protected by his common law claim for false imprisonment. Plaintiff's claim for false imprisonment, if successful, would have

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compensated him for the same injury he claims in his direct constitutional action.

Furthermore, in this case plaintiff had another avenue available to him, to wit, the administrative grievance procedure provided for in the DHR Rules. Under those rules plaintiff could have filed a grievance with the Department of Mental Health. Since there is no evidence that plaintiff ever filed a grievance action and received an unfavorable result and since plaintiff had the common law tort action for false imprisonment available to him, we cannot say that plaintiff is without adequate state remedy. Thus, because plaintiff had adequate state remedies for his constitutional claim, we conclude that he did not have a direct cause of action against defendants for the alleged violation of his liberty rights. Accordingly, we overrule plaintiff's constitutional argument.

Plaintiff has also argued that the trial court erred in dismissing his claim against defendants Irigaray and Barrett for injunctive relief. As it is undisputed that plaintiff has been discharged from the Hospital, plaintiff's claim is obviously moot, and we summarily reject this argument.

For the foregoing reasons we find that the trial court properly entered summary judgment against plaintiff on each of his claims for relief. The action of the trial court is affirmed.

Affirmed.

Judges WELLS and ORR concur.

IRT PROPERTY COMPANY, A GEORGIA CORPORATION, PLAINTIFF v. PAPAGAYO, INC., A NORTH CAROLINA CORPORATION, DEFENDANT

No. 925SC912

(Filed 19 October 1993)

1. Evidence and Witnesses § 1994 (NCI4th)—breach of lease—ambiguous lease language—parol evidence admissible

The trial court erred by excluding parol evidence of representations made during pre-lease negotiations from an action for breach of a lease by nonpayment of rent in which

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the tenant asserted that the landlord had breached the lease by changing the property from a mall to offices. The terms of the lease are susceptible to different interpretations as to whether plaintiff had the right to change the shopping center into an office center, and are therefore unclear and ambiguous. Because the terms of the lease are ambiguous, parol evidence that would aid the jury in determining the intention of the parties would be admissible.

Am Jur 2d, Contracts §§ 260-263.**2. Landlord and Tenant § 12 (NCI4th)— breach of lease—change of shopping area to offices—language of lease ambiguous—directed verdict denied**

The trial court did not err by denying a directed verdict for a tenant in a breach of lease action in which the tenant claimed that the landlord first breached the lease by changing the property from a shopping area to offices where the language of the lease was ambiguous as to the extent the landlord or its predecessor could change the property.

Am Jur 2d, Landlord and Tenant § 230 et seq.

Provision in lease as to purpose for which premises are to be used as excluding other uses. 86 ALR4th 259.

3. Landlord and Tenant § 89 (NCI4th)— action for breach of lease—nonpayment of rent—instruction that breach by landlord relieves tenant of obligation to pay—denied

The trial court acted correctly in an action for breach of a lease by failing to instruct the jury that a material breach by the landlord would relieve the tenant's obligation under the lease to pay rent where the lease included language which clearly and unambiguously states that the tenant is under the obligation to pay monthly rent to the landlord regardless of any defense the tenant could assert.

Am Jur 2d, Landlord and Tenant § 570 et seq.**4. Landlord and Tenant § 89 (NCI4th)— breach of lease action—instruction of requirement of good faith not given—no error**

The trial court did not err in an action arising from the breach of a lease by not instructing the jury on the requirement of good faith in exercising discretionary powers conferred under a contract where the record is void of any evidence

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that the landlord exercised its discretionary power to change the nature or use of the shopping center in bad faith.

Am Jur 2d, Landlord and Tenant § 570.**5. Landlord and Tenant § 11 (NCI4th)— breach of lease action— property changed from shopping mall to offices—quiet enjoyment—implied covenant of good faith and fair dealing**

The trial court did not err in an action for breach of a lease by not submitting the issues of the landlord's alleged breaches of quiet enjoyment and the implied covenant of good faith and fair dealing where the record did not support those contentions.

Am Jur 2d, Landlord and Tenant § 330 et seq.**Breach of covenant for quiet enjoyment in lease. 41 ALR2d 1414.****6. Unfair Competition § 1 (NCI3d)— breach of lease—amendment to counterclaim—amendment denied—no error**

The trial court did not err in an action for breach of a lease by denying defendant's motion to amend its counterclaim to assert a claim under Chapter 75 where there was insufficient evidence to support a claim under Chapter 75.

Am Jur 2d, Monopolies, Restraints of Trade, and Unfair Trade Practices § 696.

Appeal by defendant Papagayo from judgment entered 29 January 1992 by Judge James D. Llewellyn in New Hanover County Superior Court. Heard in the Court of Appeals 1 September 1993.

In March 1989, plaintiff IRT Property Company ("IRT") filed this action against defendant Papagayo, Inc. for breach of a lease agreement. Papagayo filed its answer asserting that it was excused or discharged from any obligations under the lease based on thirteen defenses, one being that IRT or its predecessor-in-interest breached the lease by "failing to operate, manage and maintain the Shopping Center Mall and converting the property from a Shopping Center Mall to 'key man' office suites." Further, Papagayo filed an amended answer which it asserted a counterclaim for breach of the lease's express and implied requirement that the area where Papagayo was located be operated as a retail shopping center,

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for breach of express covenant of quiet enjoyment, and for breach of implied covenant of good faith and fair dealing.

On 13 January 1992, IRT filed a motion *in limine* seeking to exclude evidence of any oral representations and pre-lease negotiations differing from the terms of the lease. On that same day, the trial court granted IRT's motion in open court, specifically excluding "[a]ny oral representations made prior to . . . this lease" After trial, the jury returned a verdict finding that Papagayo breached the lease by failing to continue to pay rents due, that IRT did not breach the lease by leasing the area near Papagayo to office and service tenants, and that IRT was entitled to recover \$110,133.32 in damages from Papagayo.

On 29 January 1992, Judge James Llewellyn entered judgment based on this verdict out of session and out of term by consent of the parties. From this judgment, defendant appeals.

Clark, Newton & Hinson, by Reid G. Hinson; and Robinson, Bradshaw & Hinson, by Robin L. Hinson, for plaintiff-appellee.

Parker, Poe, Adams & Bernstein, by Charles C. Meeker and Stephen D. Coggins, for defendant-appellant.

ORR, Judge.

In February 1985, Papagayo signed a lease agreement with IRT's predecessor to lease space on the second floor of a two-story shopping center, the Galleria in Wrightsville Beach, North Carolina, in which to operate a Mexican Restaurant. Papagayo opened its restaurant in February, 1986 and was originally successful. The other retail tenants surrounding Papagayo were not successful, however, and subsequently, they left the Galleria location. On 6 August 1987, the owners of the Galleria announced they would be renting the vacant space on the second level of the Galleria as office space. Over the next year, Papagayo experienced a decline in sales.

In 1987 and 1988, IRT purchased the shopping center in a two-step transaction and became the landlord to the businesses located in the Galleria, including Papagayo. In September 1988, Papagayo closed its restaurant and ceased to pay rent. In March, 1989, IRT instituted this suit for recovery of this rent. Papagayo counterclaimed asserting IRT breached the lease agreement. The

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jury found that Papagayo breached the agreement by failing to continue to pay rents due and that IRT did not breach the agreement.

I.

[1] On appeal, Papagayo contends that the trial court erred by excluding parol evidence of oral representations made by IRT's predecessor and pre-lease negotiations between IRT's predecessor and Papagayo's representatives. We agree.

"The general rule is that when a written instrument is introduced into evidence, its terms may not be contradicted by parol or extrinsic evidence, and it is presumed that all prior negotiations are merged into the written instrument." . . . However, "if the writing itself leaves it doubtful or uncertain as to what the agreement was, parol evidence is competent, not to contradict, but to show and make certain what was the real agreement between the parties."

Mosley & Mosley Builders, Inc. v. Landin Ltd., 87 N.C. App. 438, 442, 361 S.E.2d 608, 611 (1987), *cert. dismissed*, 322 N.C. 607, 370 S.E.2d 416 (1988) (citations omitted).

Further, "[i]f there is a latent ambiguity in the contract, preliminary negotiations and surrounding circumstances may be used to determine what the parties intended." *Jefferson-Pilot Life Ins. Co. v. Smith Helms Mulliss & Moore*, 110 N.C. App. 78, 81, 429 S.E.2d 183, 185 (1993). "A latent ambiguity may arise where the words of a written agreement are plain, but by reason of extraneous facts the definite and certain application of those words is found impracticable." *Id.* (citation omitted).

In the present case, the lease agreement states in pertinent part:

2.1 Lease. Landlord [IRT] hereby leases and demises to Tenant [Papagayo] those certain Premises . . . containing approximately 4,300 gross square feet of interior second floor space together with approximately 1,600 gross square feet of enclosed patio area located on the roof area of the adjoining premises . . . in the *Shopping Center* together with the nonexclusive license to use the Common Areas subject to such rules and regulations as Landlord shall adopt.

. . .

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1.1 Shopping Center. The term "Shopping Center" means all that certain land and the main *mall* building and associated improvements, equipment and facilities now or hereafter erected thereon known as THE *GALLERIA AT WRIGHTSVILLE* located in New Hanover County, State of North Carolina, as more particularly described on Exhibit "A" attached hereto and by this reference made a part hereof, as same may be altered, expanded or reduced from time to time. Detached buildings shall not be deemed a part of the Shopping Center.

. . .

4.7 Common Area Control/Right of Relocation. Landlord grants to Tenant and his agents, employees, and customers a nonexclusive license to use the Common Areas in common with others during the term, subject to the exclusive control and management thereof at all times by Landlord and subject, further, to the rights of Landlord set forth hereinbelow. *Landlord shall have the right at all times, in its sole discretion, to change the size, location, elevation, nature and/or use of any portion or all of the Common Areas, the Shopping Center or any part thereof as Landlord may from time to time determine, including the right to change the size thereof, to erect buildings thereon, to sell or lease part or parts thereof, to change the location and size of the landscaping and buildings on the site, and to make additions to, subtractions from or rearrangements of said buildings.*

(Emphasis added.)

The issue we must determine is whether the terms of the lease are ambiguous as to whether IRT had the right to rent open space in the Shopping Center as offices instead of retail stores, thereby changing the Shopping Center into an office center. IRT argues that the terms of Section 4.7 are unambiguous on this issue, and that this section grants it the right to rent spaces in the Shopping Center for office use. We disagree based on our conclusion that the terms are ambiguous.

First, by the title and contents of Section 4.7, it is unclear whether Section 4.7 was meant to apply to the Shopping Center or just to the Common Areas. Section 4.7 is entitled "Common Area Control/Right of Relocation", which does not include the Shopping Center, and the paragraph following this title deals almost

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exclusively with the Common Areas. Section 4.7 grants the tenant a license to use the Common Areas subject to the Landlord's right to control and manage these Common Areas. The paragraph then states that this right to use the Common Areas is "subject, further, to the rights of Landlord set forth hereinbelow." Following this sentence is the only reference to the Shopping Center in this section which states:

Landlord shall have the right at all times, in its sole discretion, to change the size, location, elevation, nature and/or use of any portion or all of the Common Areas, the Shopping Center or any part thereof as Landlord may from time to time determine

Thus, the sole reference to the Shopping Center in Section 4.7 is contained in a sentence that the preceding sentence establishes as limiting the right of the tenant to use the Common Areas. Aside from this one reference to the Shopping Center, Section 4.7 is concerned solely with the control of the Common Areas, as stated in the title. Additionally, we note that the word "Shopping Center" seems to have been inadvertently placed in this sentence. By merely changing the comma preceding the word Shopping Center to an "of" so that the sentence reads "Landlord shall have the right . . . to change the . . . nature and/or use of any portion or all of the Common Areas [of] the Shopping Center", this sentence would be consistent with the rest of the paragraph. Thus, the title and the content of Section 4.7 make it unclear whether this section applies to the Shopping Center, and it is therefore unclear whether this section grants IRT the right to change the Shopping Center.

Second, even if the language of Section 4.7 were interpreted to give IRT the right to change the Shopping Center, in light of Sections 1.1. and 2.1 and in light of the fact that the lease does not define "nature" or "use", it is unclear to what extent IRT can change the Shopping Center under this section. Section 2.1 of the lease purports to rent space to Papagayo in a "Shopping Center". Section 1.1 of the lease defines this "Shopping Center" as "all that certain land and the main mall building and associated improvements, equipment and facilities now or hereafter erected thereon known as THE GALLERIA AT WRIGHTSVILLE". The terms "mall" and "Galleria" are words normally associated with a shopping area featuring a variety of retail stores in which to

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shop. Thus, as Papagayo argues, the lease could be interpreted as impliedly promising to continue to rent the space surrounding Papagayo's restaurant solely to retail stores, and this promise would limit IRT's right to change the Shopping Center under Section 4.7.

On the other hand, the lease does not contain an express promise to rent the surrounding space solely to retail stores. Therefore, as IRT argues, the lease could be interpreted as giving IRT the right under Section 4.7 to change the Shopping Center to include office areas surrounding Papagayo's restaurant.

Thus, the terms of the lease are susceptible of different interpretations, and are, therefore, unclear and ambiguous. *See St. Paul Fire & Marine Ins. Co. v. Freeman-White Associates, Inc.*, 322 N.C. 77, 83, 366 S.E.2d 480, 484 (1988) ("The fact that a dispute has arisen as to the parties' interpretation of the contract is some indication that the language of the contract is, at best, ambiguous.").

In *Parker Marking Systems, Inc. v. Diagraph-Bradley Industries, Inc.*, 80 N.C. App. 177, 341 S.E.2d 92, *disc. review denied*, 317 N.C. 336, 346 S.E.2d 502 (1986), this Court stated the applicable rules for interpreting unclear, ambiguous language in a contract. The Court stated:

While clear and unambiguous contracts may be interpreted by the court as a matter of law, if the language used by the parties is ambiguous and their intention unclear, interpretation of the contract is for the jury under proper instructions from the court. . . . Extrinsic evidence relating to the agreement is competent to show the intentions of the parties and to clarify the terms of the contract.

Id. at 181, 341 S.E.2d at 95 (citations omitted).

In the present case, the meaning of the terms found in Section 4.7 of the lease are also unclear and ambiguous as they relate to Sections 1.1 and 2.1 of the lease. Papagayo offered evidence of pre-lease negotiations in order to explain these terms, which evidence the trial court excluded. Papagayo properly preserved the testimony which was excluded by the trial court as required for this matter to be heard on review. *Currence v. Hardin*, 296 N.C. 95, 249 S.E.2d 387 (1978). Because the terms of the lease are ambiguous, parol evidence that would aid the jury in determining the intention of the parties would be admissible. *See Asheville Mall, Inc. v. F.W. Woolworth Co.*, 76 N.C. App. 130, 331 S.E.2d

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772 (1985); *See also Mosley*, 87 N.C. App. 438, 361 S.E.2d 608 (1987). Our review of the evidence excluded shows that it would be admissible to aid the jury in determining the intention of the parties, and the trial court erred, therefore, in excluding this evidence of oral representations made by IRT's predecessor and pre-lease negotiations between Papagayo's representatives and IRT's predecessor. Further, the trial court's erroneous exclusion of this parol evidence was prejudicial to Papagayo as it was necessary to determine IRT's obligations under the lease and thus to determine whether IRT breached the lease.

II.

[2] Papagayo also contends that the trial court erred by denying its motion for a directed verdict based on the argument that the terms of the lease unambiguously state that the lease was for space located in a shopping area and that IRT's predecessor materially breached the lease by changing this shopping area to an office area. Based on our holding above that the language of the lease is ambiguous as to the extent IRT's predecessor or IRT could change the Shopping Center, we find no error.

III.

[3] Next, Papagayo contends that the trial court erred by failing to instruct the jury that a material breach by IRT would relieve Papagayo's obligation under the lease to pay IRT rent. We disagree.

Section 3.1 of the lease states:

Tenant shall pay to Landlord, without notice, demand, reduction, setoff or any defense, a minimum annual rental . . . of . . . (\$64,500.00) payable in equal monthly installments of . . . (\$5,375.00) each in advance on or before the first day of each month.

This language clearly and unambiguously states that Papagayo is under the obligation to pay monthly rent to IRT, regardless of any defense Papagayo could assert. Thus, the trial court did not err in declining to instruct the jury that a material breach by IRT would relieve Papagayo from its obligation to pay rent on a monthly basis. We note that this provision would not preclude Papagayo from recovering rents paid under this provision should Papagayo prevail on the merits.

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IV.

[4] Papagayo also contends that the trial court erred by declining to instruct the jury on the requirement of good faith in exercising discretionary powers conferred under a contract. We disagree.

The record is void of any evidence that IRT exercised its discretionary power to change the "nature" or "use" of the Shopping Center in bad faith. The trial court did not err by refusing to instruct the jury on the requirement of good faith.

V.

[5] Next, Papagayo contends that the trial court erred by not submitting the issues of IRT's alleged breach of quiet enjoyment and IRT's alleged breach of implied covenant of good faith and fair dealing. We disagree.

The evidence contained in the record does not support Papagayo's contentions that IRT breached Papagayo's quiet enjoyment or implied covenant of good faith and fair dealing. Accordingly, the trial court did not err in refusing to submit these issues to the jury. *See Cutts v. Casey*, 278 N.C. 390, 420, 180 S.E.2d 297, 313 (1971) (when it is clear that plaintiff has shown no right to relief, the judge will grant defendant a directed verdict at the close of plaintiff's evidence and not submit the issue to the jury).

VI.

[6] Finally, Papagayo contends that the trial court erred by denying its motion to amend its counterclaim to assert a claim under Chapter 75. We disagree.

"Amendment of pleadings after a response has been served is only by 'leave of court . . . and leave shall be freely given when justice so requires.'" *Chicopee, Inc. v. Sims Metal Works, Inc.*, 98 N.C. App. 423, 430, 391 S.E.2d 211, 216, *defendant's disc. review denied*, 327 N.C. 426, 395 S.E.2d 674, *plaintiff's disc. review allowed*, 327 N.C. 426, 395 S.E.2d 674, *defendant's disc. review denied*, 327 N.C. 426, 395 S.E.2d 675 (1990); N.C.R. Civ. P. 15(a). "[T]he grant or denial of an opportunity to amend pleadings is within the discretion of the trial court" *Coffey v. Coffey*, 94 N.C. App. 717, 722, 381 S.E.2d 467, 471, *disc. review allowed*, 325 N.C. 705, 388 S.E.2d 450 (1989), *review dismissed*, 326 N.C. 586, 391 S.E.2d 40 (1990) (citation omitted). It is an abuse of this discretion, however, to refuse to grant leave to amend without

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any justifying reason appearing for the denial. *Id.* " 'Absent any declared reason for denial of leave to amend, the appellate court may examine any apparent reasons for such denial.' " *Id.*

In the present case, the trial court did not state its reasons for denying Papagayo's motion to amend its pleadings. "Although a trial court is not required to state specific reasons for denial of a motion to amend, . . . reasons that would justify a denial are '(a) undue delay, (b) bad faith, (c) undue prejudice, (d) futility of amendment, and (e) repeated failure to cure defects by previous amendments.' " *Chicopee, Inc.*, 98 N.C. App. at 430, 391 S.E.2d at 216 (citations omitted).

Our review of the record shows that insufficient evidence exists to support a claim under Chapter 75 against IRT. Thus allowing Papagayo to amend its pleadings to include such a claim would be futile, and the trial court did not err in denying Papagayo's motion to amend.

Reversed and Remanded.

Judges WELLS and MCCRODDEN concur.

KENT D. CRAWFORD, AND WIFE, LYNN B. CRAWFORD, PLAINTIFFS v.
JAMIL A. FAYEZ, DEFENDANT

No. 9218SC573

(Filed 19 October 1993)

1. Evidence and Witnesses § 110 (NCI4th)— medical malpractice—evidence of habit—standards for admission

Proof of habit by evidence of specific instances of conduct is permitted by N.C.G.S. § 8C-1, Rule 406; however, the trial court must make certain inquiries to determine the reliability and probative value of the proffered evidence before evidence of specific instances of conduct may be admitted to prove habit. The court should consider (1) the similarity of the instances, (2) their number, and (3) their regularity; whether the specific instances are sufficient to establish habit is a question to be decided on a case-by-case basis, and the trial court's

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rulings thereon will not be disturbed absent an abuse of discretion.

Am Jur 2d, Evidence §§ 303, 316.

Habit or routine practice evidence under Uniform Evidence Rule 406. 64 ALR4th 567.

Admissibility of evidence of habit or routine practice under Rule 406, Federal Rules of Evidence. 53 ALR Fed 703.

2. Evidence and Witnesses § 110 (NCI4th)— negligent prescription of steroid—evidence of habit—admissible

The trial court did not abuse its discretion in admitting the testimony of defendant's former patients in a medical malpractice action where plaintiff alleged that defendant negligently prescribed a steroid without discussing possible side effects; the evidence at trial showed that defendant prescribed the drug to twenty-six patients; and five of those former patients testified at trial that defendant had described the possible side effects of the drug. In light of the similarity, number, and regularity of these instances of conduct, we find no abuse of discretion by the trial court in admitting the testimony of defendant's former patients.

Am Jur 2d, Evidence §§ 303, 316.

Habit or routine practice evidence under Uniform Evidence Rule 406. 64 ALR4th 567.

Admissibility of evidence of habit or routine practice under Rule 406, Federal Rules of Evidence. 53 ALR Fed 703.

3. Physicians, Surgeons, and Other Health Care Professionals § 148 (NCI4th)— negligent prescription of steroid—instructions—informed consent

The trial court did not err in a medical malpractice action in which plaintiff alleged that defendant had prescribed a steroid without discussing possible side effects by instructing the jury, based on N.C.G.S. § 90-21.13(a)(3), that plaintiff would have to prove that a reasonable person under all the surrounding circumstances would not have given consent. This precise issue has been decided adversely to the plaintiff in *Dixon v. Peters*, 63 N.C. App. 592.

Am Jur 2d, Physicians, Surgeons, and Other Healers § 366.

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[112 N.C. App. 328 (1993)]

Appeal by plaintiffs from judgment entered 28 December 1991 by Judge James M. Webb in Guilford County Superior Court. Heard in the Court of Appeals 29 April 1993.

Plaintiffs filed this action alleging in relevant part that defendant, Dr. Fayez, negligently recommended and prescribed a steroid drug, Medrol, to treat plaintiffs' infertility. According to the evidence, plaintiffs were referred to defendant in 1985 for evaluation and treatment of infertility. In early 1986, at a time when plaintiffs were not being treated by defendant, Lynn Crawford became pregnant, but the pregnancy ended with a miscarriage in March, 1986. At that time, defendant advised plaintiffs to continue their efforts to conceive a child but to return for further evaluation in six months if they were unsuccessful.

Plaintiffs returned to defendant in October 1986 at which time defendant tested the couple for sperm antibodies. On 9 January 1987, defendant informed plaintiffs that their sperm antibody levels were high and discussed with them the use of the steroid drug, Medrol, as a treatment. The substance of those discussions was a central issue at the trial of this case.

Plaintiffs testified that after defendant informed them of his recommended treatment, defendant left the room saying that his nurse would bring the Medrol prescription and inform plaintiffs of the drug's possible side effects. Plaintiffs further testified that the nurse discussed the possible short term side effects of Medrol including restlessness, sleeplessness, nausea and vomiting, and flushing or bloating of the face. Plaintiffs testified that neither defendant nor his nurse ever informed them of the possibility that Medrol could cause necrosis of the hip bones.

Conversely, defendant testified that he discussed with plaintiffs the various short term and long term side effects of Medrol. He further testified that he specifically informed plaintiffs of the possibility that the drug could cause avascular necrosis of the hip bones. Defendant testified that when prescribing Medrol it was his habit and routine practice to inform patients of the drug's possible side effects including bone necrosis. In addition to defendant's own testimony, five of his former patients testified, over plaintiffs' objection, that when they were prescribed Medrol by defendant, he informed them of the possibility of bone damage as a side effect. The trial court allowed this former patient testimony for the "limited purpose of showing routine practice of the defendant."

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Plaintiffs took the medication as prescribed by defendant for the following six months. Plaintiffs returned to defendant's clinic in July 1987 at which time they were advised by defendant that there would be some residual effects from the medication and that they should wait six months before receiving further treatment. In December 1987, plaintiffs returned to see defendant. According to plaintiffs, it was during this visit that defendant first informed plaintiffs of the possibility of hip complications associated with the use of Medrol. Shortly thereafter, Mr. Crawford began to experience pain in his groin which interfered with his regular activities. In April 1988, he was diagnosed as having avascular necrosis of both hips. The avascular necrosis was determined to have been caused by the high dose steroids prescribed by defendant. Mr. Crawford subsequently underwent surgery on both hips.

Plaintiffs appeal from a jury verdict in favor of defendant.

Law Offices of Grover C. McCain, Jr., by Grover C. McCain, Jr., and Phyllis Moore for plaintiff-appellants.

Bell, Davis & Pitt, P.A., by Joseph T. Carruthers and Charlot F. Wood, for defendant-appellee.

MARTIN, Judge.

[1] Plaintiffs assign error to the admission of testimony by defendant's former patients and to the court's instructions to the jury. We find no error in the trial below.

At trial, five of defendant's former patients were permitted to testify, over plaintiffs' objection, that defendant had informed them of Medrol's possible side effects, including bone damage. The trial court admitted this testimony for the "limited purposes of showing routine practice of the defendant as it relates to information passed to these patients who were prescribed Medrol and any possible side effects specifically to include bone necrosis." At trial, and in their brief to this Court, plaintiffs argued that "habit" may not be proven by the testimony of a succession of witnesses who observed the behavior in question on a single occasion. Rather, plaintiffs contended, a person's habit must be proven by the testimony of a witness who has regularly observed the habitual behavior. During oral arguments in this Court, plaintiffs' counsel argued that even if habit is susceptible of proof by evidence of specific instances of the conduct in question, the testimony of defendant's five former

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patients was inadmissible because there were insufficient instances of defendant's conduct to establish the existence of a habit.

To decide the issue, we must first determine whether the North Carolina Rules of Evidence permit proof of habit by specific instances of conduct. We begin our inquiry with a review of G.S. § 8C-1, Rule 406 and the cases concerning the rule. G.S. § 8C-1, Rule 406 provides as follows:

Evidence of the habit of a person or of the routine practice of an organization whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.

While Rule 406 is silent as to the methods by which the existence of a habit may be proven, our case law establishes that "habit" may be proven by testimony of a witness who is sufficiently familiar with the person's conduct to conclude that the conduct in question is habitual. In *State v. Palmer*, 334 N.C. 104, 431 S.E.2d 172 (1993), the Court found no error in the admission of testimony by the decedent's sister that the decedent had the habit of keeping money about her person. In *Barber v. Babcock & Wilcox Construction Co.*, 98 N.C. App. 203, 390 S.E.2d 341 (1990), *rev'd on other grounds*, 101 N.C. App. 564, 400 S.E.2d 735 (1991), our Court held that the corporate defendant's safety specialist was competent to testify as to the defendant's routine practice for removing asbestos insulation. In *State v. Simpson*, 299 N.C. 335, 261 S.E.2d 818 (1980), the Court ruled that a rest home employee could properly testify regarding her habit of keeping the business' screens and windows closed.

It is unclear, however, whether habit may be shown by a succession of witnesses who observed the relevant conduct on separate, single occasions. In his treatise on the law of evidence, Professor Brandis states, "[h]abit may be proved by the direct testimony of a witness who is acquainted with it, and also, it seems by evidence of specific acts sufficiently numerous and similar to justify the inference of a habit." 1 H. Brandis, Jr., *Brandis on North Carolina Evidence* § 95, at 433 (3d Ed. 1988). In support of the latter proposition, the author cites *Davis v. Lyon*, 91 N.C. 444 (1884). The opinion in *Davis*, however, does not disclose which method was utilized by the defendants to prove the plaintiff's usual practice, and provides little guidance in the instant case.

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The parties point out that North Carolina's Rule 406 is identical to its federal counterpart. Fed. R. Evid. 406. Where our rule and the federal rule are similar, we may look to the federal rule's legislative history and federal court interpretations for guidance in determining our General Assembly's intent in adopting the rule. Commentary, N.C. Gen. Stat. § 8C-1, Rule 102; *State v. Ross*, 329 N.C. 108, 405 S.E.2d 158 (1991); *State v. Outlaw*, 94 N.C. App. 491, 380 S.E.2d 531 (1989). The Federal decisions appear to come down on both sides of the issue.

In *Weil v. Seltzer*, 873 F.2d 1453 (D.C. Cir. 1989), a case cited by plaintiffs, the court held that specific instances of conduct were inadmissible to prove habit. In *Weil*, the plaintiffs sought to introduce the testimony of the defendant physician's former patients as evidence of the physician's habit regarding his treatment of allergy patients. *Id.* at 1461. In ruling the evidence inadmissible, the court reasoned that because the former patients had never observed the doctor with other patients they could not demonstrate any knowledge of the doctor's alleged routine practice. *Id.* The court concluded that evidence concerning the physician's treatment of five former patients was not of the nonvolitional, habitual type contemplated by Rule 406, and that it more closely resembled inadmissible character evidence.

In *Wilson v. Volkswagen of America, Inc.*, 561 F.2d 494 (4th Cir. 1977), *cert. denied*, 434 U.S. 1020, 54 L.Ed.2d 768 (1978), the Fourth Circuit Court of Appeals considered the admissibility of specific instances of the defendant's conduct to prove that the defendant possessed the habit of "stone walling" during discovery proceedings. *Id.* at 511. The plaintiffs offered as evidence of the defendant's habit three prior cases in which default judgments had been entered against the defendant for failure to comply with discovery orders. Although the court ruled that the evidence was inadmissible, the court's ruling was based on the inadequacy of the sampling by which the plaintiff sought to prove the defendant's habit. *Id.* at 512. The court noted that "[i]t has been repeatedly stated that habit or pattern of conduct is never to be lightly established, and evidence of examples, for purpose of establishing such habit, is to be carefully scrutinized before admission." *Id.* at 511. However, the court also observed that, when sufficiently numerous and regular, examples of conduct are admissible to establish a pattern or habit.

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In *Perrin v. Anderson*, 784 F.2d 1040 (10th Cir. 1986), the court ruled that evidence showing that the decedent had reacted violently toward police on several prior occasions was admissible under Rule 406 to establish that the decedent routinely reacted violently when dealing with uniformed police officers. The court specifically held that testimony concerning prior specific acts is admissible as proof of habit. *Id.* at 1046. In *Wetherill v. University of Chicago*, 570 F. Supp. 1124 (N.D.Ill. 1983), the plaintiffs sought to recover damages for injuries they sustained as the result of *in utero* exposure to DES. The plaintiffs' mothers were participants in a study conducted by the defendant. The plaintiffs claimed that their mothers had been given DES without their consent. To rebut the testimony of the plaintiffs' mothers, the court approved the admissibility of testimony by six other study participants that they had consented to the use of DES after full disclosure. The court ruled that this testimony was admissible as evidence of the "routine practice" of the defendant.

The legislative history of Rule 406 appears to support the admissibility of evidence of specific instances of conduct to prove a person's habit or routine practice. The preliminary draft of the Federal Rule of Evidence contained two subsections. Subsection (a) was identical to the present N.C.R. Evid. 406. Subsection (b) described the methods of proving habit and included proof "in the form of an opinion or by specific instances of conduct sufficient in number to warrant a finding [of habit.]" Wright & Graham, *Federal Practice and Procedure: Evidence* § 5271 at 9.

During House consideration of the proposed rule, subsection (b) was the subject of significant objection, much of which focused on the use of opinion evidence to prove habit. *Id.* Subsection (b) was ultimately deleted by the House subcommittee. *Id.* at 10. The House Judiciary Committee affirmed this deletion stating:

The Committee deleted this subdivision believing that the method of proof of habit and routine practice should be left to the courts to deal with on a case-by-case basis. At the same time, the Committee does not intend that its action be construed as sanctioning a general authorization of opinion evidence in this area.

Id. n. 15 (citing House Judiciary Committee Report p. 5). The commentary provides insight that Congress anticipated that habit should be proven by evidence of specific instances of conduct and that

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proof in the form of opinion testimony was disfavored. The Advisory Committee's Note to Rule 406 supports this interpretation. The Note states in part:

The extent to which instances must be multiplied and consistency of behavior maintained in order to rise to the status of habit inevitably gives rise to difference of opinion. While adequacy of sampling and uniformity of response are key factors, precise standards for measuring their sufficiency for evidence purposes cannot be formulated. (Citation omitted.)

Clearly the Advisory Committee's Note contemplates proof of habit or routine practice by evidence of specific instances of conduct.

From our review of the foregoing authorities, we are persuaded that Rule 406 permits proof of habit by evidence of specific instances of conduct. Before evidence of specific instances of conduct may be admitted to prove habit, however, the trial court must make certain inquiries to determine the reliability and probative value of the proffered evidence.

As explained by the court in *Wilson v. Volkswagen of America, Inc.*, 561 F.2d 494 (4th Cir. 1977), the instances of specific conduct must be sufficiently numerous to warrant an inference of systematic conduct and to establish one's regular response to a repeated specific situation. The instances must be sufficiently regular or the circumstances sufficiently similar to outweigh the danger, if any, of prejudice and confusion. *Id.* In determining whether the instances are sufficiently numerous and regular, the key criteria are adequacy of sampling and uniformity of response, or the ratio of reactions to situations. *Id.*

Wright & Graham, *Federal Practice and Procedure: Evidence* § 5276, advocates that courts use a three part inquiry to determine the sufficiency of the specific instances proffered to prove habit. In considering the sufficiency of the evidence, the court should "consider (1) the similarity of the instances, (2) their number, and (3) their regularity." *Id.* at 61. By evaluating the proffered evidence in light of these criteria a trial court can adequately determine whether the specific instances of conduct rise to the level of habit contemplated in Rule 406. Whether the specific instances are sufficient to establish habit is a question to be decided on a case-by-case basis, and the trial court's rulings thereon will not be disturbed absent an abuse of discretion. N.C.R. Evid. 104 (1992).

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[2] Having determined that evidence of specific instances of conduct may be admissible as proof of habit under G.S. § 8C-1, Rule 406, we must now decide whether the testimony admitted in the present case was sufficient to establish that defendant had the habit of warning his patients about the side effects of Medrol.

The evidence at trial showed that defendant prescribed Medrol to twenty-six patients. Of these twenty-six patients, five former patients testified at trial. Defendant treated the five former patients between 1985 and 1987. Plaintiffs began treatment with Medrol in January 1987. Each of the former patients, like plaintiffs, was diagnosed as having high levels of sperm antibodies. The former patients testified that defendant discussed his diagnosis with them and that he recommended that their condition be treated with Medrol. All of the former patients who testified stated that defendant, when discussing Medrol, described the possible side effects of the drug, and specifically informed them that the possible side effects included weakening of the bones and joints and increased brittleness of the bones. In light of the similarity, number, and regularity of these instances of conduct, we find no abuse of discretion by the trial court in admitting the testimony of defendant's former patients. This assignment of error is overruled.

[3] Plaintiffs next assign error to a portion of the trial court's jury charge. The trial court's charge was based on G.S. § 90-21.13(a)(3) (1990), which provides that no recovery may be had in an action alleging a lack of informed consent if "a reasonable person, under all the surrounding circumstances, would have undergone such treatment" The court instructed the jury that before plaintiffs would be entitled to recover damages for their injuries they would have to prove, in part, that defendant did not advise plaintiffs of the possibility of bone necrosis and that "*a reasonable person under all the surrounding circumstances would not have given consent.*" Plaintiffs contend that this charge, by imposing an objective standard for determining proximate cause, denied plaintiffs the right to equal protection under the state and federal constitutions. We disagree. This precise issue has been previously decided adversely to the plaintiff in *Dixon v. Peters*, 63 N.C. App. 592, 306 S.E.2d 477 (1983). In *Dixon*, we held that there was a rational basis for the promulgation of G.S. § 90-21.13(a)(3) and that therefore it was not violative of the plaintiff's right to equal protection. *Dixon*, at 602, 306 S.E.2d at 477. The trial court's instructions correctly applied the statute. This assignment of error is overruled.

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No error.

Judges EAGLES and JOHN concur.

STATE OF NORTH CAROLINA v. TERRY RAY JONES

No. 9218SC1025

(Filed 19 October 1993)

**1. Evidence and Witnesses § 1255 (NCI4th)— confession—
invocation of right to counsel—conversation initiated by
defendant**

The trial court properly denied defendant's motion to suppress his inculpatory statement in a prosecution for breaking and entering and larceny where defendant was arrested at approximately 1:05 p.m. and taken to the Greensboro Police Department; defendant waived his Miranda rights and answered questions from the officers until approximately 1:50 p.m., when he stopped answering questions and asked to see an attorney; one or more officers indicated that the only attorney who might be available then was an assistant district attorney; defendant agreed to talk with an assistant district attorney, but the officers did not bring one in to talk with him; the officers stopped the interrogation and left defendant in the interrogation room until about 7:00 p.m., when they obtained a search warrant for his apartment; defendant was taken with the officers to execute the search warrant; he was seated handcuffed on the living room couch next to a detective while other officers searched the apartment and could see and hear virtually everything going on in the apartment; there was general conversation between defendant and the detective including a request for a cigarette, which was granted; the court found that none of that conversation was calculated to induce defendant to make incriminating statements; and defendant told the detective that he would show the officers which items were stolen after he saw that the whole process of the search and the officers' questions was upsetting his girlfriend and daughter and making them cry.

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Am Jur 2d, Arrest §§ 75-77; Criminal Law §§ 788 et seq.; Evidence §§ 555-557, 614.

Admissibility of confession or other statement made by defendant as affected by delay in arraignment—modern state cases. 28 ALR4th 1121.

2. Arrest and Bail § 115 (NCI4th)— warrantless arrest—unnecessary delay in taking defendant before judicial official—no causal connection with incriminating statement

The trial court properly denied defendant's motion to suppress incriminating statements where defendant was arrested at approximately 1:05 p.m. and questioned until about 1:50 p.m., when he asked to see an attorney; he was told that the only attorney available was an assistant district attorney; he was left in the interrogation room until about 7:00 p.m.; and then he was taken with officers while they searched his apartment, during which time he made incriminating statements. Although the Court of Appeals disapproved of the practice of law enforcement officers holding uncharged defendants without promptly taking them before the magistrate as required by N.C.G.S. § 15A-501(2), and the practice of taking uncharged and uncounselled defendants with police officers when executing search warrants at defendants' premises, it could not be said as a matter of law that defendant's incriminating statements would not have been obtained but for the officers' violations of G.S. 15A-501(2) and (5) and defendant did not argue below that he would not have made the incriminating statements had he been taken before a judicial official and advised of his right to communicate with counsel and friends pursuant to the statute.

Am Jur 2d, Arrest §§ 75-77; Criminal Law §§ 788 et seq.; Evidence §§ 555-557, 614.

Admissibility of confession or other statement made by defendant as affected by delay in arraignment—modern state cases. 28 ALR4th 1121.

Appeal by defendant from judgment signed 30 April 1992 by Judge Judson D. DeRamus, Jr. in Guilford County Superior Court. Heard in the Court of Appeals on 1 September 1993.

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Defendant was convicted of three counts of felonious breaking and entering, G.S. 14-54(a), and three counts of felonious larceny, G.S. 14-72(b)(2). Defendant was sentenced to 3 consecutive ten year terms for the three felonious larceny counts with three ten year terms for breaking and entering running consecutively. Over objection and defendant's motion to suppress, the trial court admitted defendant's written confession and other statements he made to officers during the execution of a search warrant for his apartment. Defendant appeals.

At the conclusion of the suppression hearing, the trial court found the following facts: On 25 July 1991, law enforcement officers arrested defendant at approximately 1:05 p.m. and took him to the Greensboro Police Department. Defendant waived his Miranda rights and answered questions from the officers until approximately 1:50 p.m. Defendant then stopped answering questions and asked to see an attorney. When defendant stated that he did not have a particular attorney, one or more officers indicated that the only attorney that might be available to him then was an assistant district attorney. Defendant agreed to talk with an assistant district attorney, but the officers did not bring one in to talk with him.

The officers stopped the interrogation and left defendant in the interrogation room until about 7:00 p.m. when they obtained a search warrant for his apartment. After obtaining the search warrant, the officers took the defendant with them to execute the search warrant for his apartment. Defendant was seated handcuffed on the living room couch next to Detective Lee Walker while other officers searched the apartment. From the couch, defendant could see and hear virtually everything going on in the apartment. During the search, there was general conversation between defendant and Detective Walker including, "a request for a cigarette by the defendant and compliance with and assistance with that request by Officer Walker." The court found that although there was further conversation between defendant and Detective Walker, none of that conversation was calculated to induce defendant to make incriminating statements. The court also found that defendant made no incriminating statements during this conversation with Detective Walker.

Defendant's live-in girlfriend Rhonda Huggins and his infant daughter were also in the apartment. In searching for the stolen items, the officers began asking Ms. Huggins which items were

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hers, and which items belonged to defendant. Ms. Huggins cooperated, but was visibly upset by the questioning. When defendant saw that the whole process of the search and the officers' questions was upsetting his girlfriend and daughter and making them cry, he told Detective Walker that he would show the officers which items were stolen. Specifically, the trial court found that:

[T]he defendant upon observing Rhonda Huggins and the child . . . crying in the process that they were being put through by the law enforcement officers . . . and as a proximate result of seeing this procedure, the defendant decided to initiate further conversation with law enforcement officers present at the search scene . . . so they would not bother or ask Rhonda Huggins further about other items. . . .

[T]he defendant initiated this conversation with the officers as a proximate result of his concern for his family . . . and not by reason of any conversation he had with Officer Lee Walker or any other officer. . . . [T]here was no improper initiation of any further interrogation by the law enforcement officers during the search.

After defendant showed the officers which items were stolen, they took him back to the police station, where the officers again advised defendant of his Miranda rights. Defendant signed a waiver form waiving those rights and then made a written confession. He also signed a statement indicating that he initiated the conversation with Detective Walker. When defendant finished making his statement shortly after 8:30 p.m., he was taken to the hospital for tests pursuant to the search warrant and then to McDonald's for something to eat. Finally, between 11:45 p.m. and midnight of 25 July 1991, defendant was taken for his first appearance before a magistrate. The court found that between 1:50 p.m. and 7:00 p.m. there was an unnecessary delay in taking defendant before a magistrate in violation of G.S. 15A-501(2). The court also found that there was a violation of G.S. 15A-501(5), because by 1:50 p.m. defendant had not been advised of his right to communicate with counsel and friends, nor had he been given any time or opportunity to do so until 7:00 p.m. However, the court found that the unnecessary delays in violation of G.S. 15A-501(2) and (5) did not proximately cause defendant's initiation of new conversations with Detective Walker, and that the delays did not proximately cause

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defendant to make the additional statements he made at the police station.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Rebecca B. Barbee, for the State.

McNairy, Clifford & Clendenin, by Robert O'Hale, for defendant-appellant.

EAGLES, Judge.

Defendant's only assignment of error is that the trial court erred in allowing into evidence the statements that he made to police officers after he requested an attorney. We disagree.

[1] Defendant first challenges the trial court's finding of fact that defendant initiated the conversation with law enforcement officers that resulted in the incriminating statements that he made in his apartment. In *Edwards v. Arizona*, 451 U.S. 477, 68 L.Ed.2d 378 (1981), the United States Supreme Court held that once an accused asserts his right to counsel, the police may not further interrogate him until an attorney has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police. Here, the trial court found that defendant initiated the additional conversation. The trial court's findings of fact are conclusive on appeal if they are supported by competent facts in the record. *State v. Tann*, 302 N.C. 89, 98, 273 S.E.2d 723, 726 (1981); *State v. Gray*, 268 N.C. 69, 70, 150 S.E.2d 1, 8 (1966).

Defendant testified on *voir dire* that Detective Walker sat beside him on the couch and said, "You've got a nice place here," to which defendant responded, "Thank you." Defendant then testified that Detective Walker asked him, "What happened? . . . Why did you get in trouble?" Defendant testified that he responded, "Cocaine had a lot to do with it." Defendant contends that Detective Walker's statements were the initiation of the conversation that led defendant to make the subsequent incriminating statements.

Detective Walker testified on *voir dire* that the conversation on the couch was begun when defendant asked him if he could smoke. Detective Walker testified that he gave defendant a cigarette and lit it for him. Detective Walker also testified that both he and defendant could hear the other officers asking Ms. Huggins which items were hers and which items were his. He further testified

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that after awhile, defendant said, "I've messed up, and I'm in big trouble, and I'll tell you about it."

Although the testimony regarding who started the conversation on the couch is conflicting, there is sufficient evidence in the record to support the trial court's findings of fact. The trial court found that some general conversation took place between defendant and Detective Walker on the couch during the execution of the search warrant, "including a request for a cigarette by the defendant and compliance with and assistance with that request by Officer Walker." The court found, however, that none of that conversation was calculated to induce defendant to make incriminating statements. The trial court also found that defendant made no incriminating statements during that conversation. These findings of fact are consistent with and supported by Detective Walker's testimony. We conclude that there is sufficient competent evidence to support the trial court's findings of fact.

Defendant further argues that when considering the totality of the circumstances, the actions of the police officers after defendant had requested an attorney at 1:50 p.m. constituted the functional equivalent of an interrogation. In *Rhode Island v. Innis*, 446 U.S. 291, 64 L.Ed.2d 297 (1980), the United States Supreme Court defined interrogation under *Miranda* to refer not only to express questioning

but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect. The latter portion of this definition focuses primarily upon the perceptions of the suspect, rather than the intent of the police.

Id. at 301, 64 L.Ed.2d at 308 (footnotes omitted).

Defendant argues that after he requested an attorney, he was left alone in the interrogation room from 1:50 p.m. until 7:00 p.m. without being given an opportunity to consult with a lawyer. He further argues that at 7:00 p.m., police officers took him with them to watch them execute the search warrant for his apartment. Defendant said that he volunteered to tell the officers which items were stolen, because he saw that his girlfriend and daughter were very upset, and he did not want to put them through any more pain. Defendant alleges that the police officers knew that defend-

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ant's girlfriend and daughter would be there, and that the only reason they took him along was to make him watch as his girlfriend and daughter were subjected to the whole process of the search. Defendant alleges that the police officers intentionally subjected him to the emotional distress of his girlfriend and daughter in the hopes that defendant would make incriminating statements. Defendant argues that all of these actions taken together constitute the functional equivalent of an interrogation, because the police should have known that these actions were "reasonably likely to elicit an incriminating response."

We cannot say as a matter of law that the police should have known that their actions taken together would elicit an incriminating response from defendant. In deciding this issue, we focus primarily on the perceptions of the defendant, rather than the intent of the officers. *Rhode Island v. Innis*, 446 U.S. 291, 301, 64 L.Ed.2d 297, 308 (1980). Defendant never testified on *voir dire* that he felt pressured into telling the officers where the stolen items were. By defendant's own testimony, he only asked to call an attorney one time after he agreed to talk with the assistant district attorney. Although defendant testified that he asked Detective Byrd if he could call an attorney sometime before he was taken to his apartment, Detective Byrd testified that defendant did not ask to call an attorney. The trial court heard the conflicting evidence and found as a fact that defendant did not ask to call an attorney. The trial court's findings of fact are conclusive on appeal when they are supported by competent facts in the record. *State v. Tann*, 302 N.C. 89, 98, 273 S.E.2d 723, 726 (1981); *State v. Gray*, 268 N.C. 69, 70, 150 S.E.2d 1, 8 (1966). Detective Byrd's testimony is competent evidence to support that finding.

Furthermore, defendant himself testified that he told Detective Walker, "Look, I'll go ahead and tell you what's stolen. I don't want to see them go through anymore." Under certain circumstances, an investigating officer's statement that a suspect's relatives may be released from custody or may not be arrested if the suspect confesses, may render the suspect's resulting confession involuntary. *State v. Lang*, 309 N.C. 512, 308 S.E.2d 317 (1983) (citing *State v. Branch*, 306 N.C. 101, 107, 291 S.E.2d 653, 658 (1982)). However, the mere desire of a defendant to protect a relative from the distress of a lawful search will not render his confession inadmissible where the desire to protect the relative and the hope of being able to do so were not suggested by the police, but originated

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with the accused. *State v. Lang, supra*. Although defendant said he showed police which items were stolen to protect his girlfriend and daughter, the police officers had never suggested that they were in any danger of being charged or arrested. Defendant's girlfriend voluntarily cooperated with police during the search, although she was visibly upset. There is no indication in the record that defendant's girlfriend was prevented from leaving the apartment during the search. Since the officers did not threaten defendant's girlfriend or force her to cooperate, we cannot say that the officers should have known that her reaction to the search would be reasonably likely to cause defendant to make an incriminating statement. Accordingly, we hold that these acts do not constitute the functional equivalent of an interrogation.

[2] Finally, defendant argues that his statements should have been suppressed because they were the result of a substantial violation of G.S. 15A-501(2) and (5). G.S. 15A-501(2) states that a person arrested without a warrant must be taken before a judicial official without unnecessary delay. G.S. 15A-501(5) states that a person must be advised of his right to communicate with counsel and friends without unnecessary delay, and that he must be allowed a reasonable time and opportunity to do so. The trial court found unnecessary delays in taking defendant before a judicial official and in advising him of his right to communicate with counsel and friends. However, the trial court also found that these unnecessary delays did not proximately cause defendant's incriminating statements.

Evidence obtained as a result of a substantial violation of Chapter 15A may be suppressed. G.S. 15A-974(2). However, G.S. 15A-974(2) requires at a minimum that a "but-for" causal relationship exist between the violation of the statute and the acquisition of the evidence sought to be suppressed. *State v. Richardson*, 295 N.C. 309, 322, 245 S.E.2d 754, 763 (1978). The evidence must be such that it would not have been obtained but for the police's unlawful conduct. *Id.* The trial court found that the violations of G.S. 15A-501(2) and (5) were not proximately related to defendant's incriminating statements.

We disapprove of the practice of law enforcement officers holding uncharged defendants without promptly taking them before the magistrate as required by G.S. 15A-501(2). We also do not approve the practice of law enforcement officers taking uncharged

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and uncounselled defendants along with police officers when executing search warrants at defendants' premises. However, on the facts before us, we cannot say as a matter of law that defendant's incriminating statements would not have been obtained but for the officers' violations of G.S. 15A-501(2) and (5). Defendant did not argue below that he would not have made the incriminating statements had he been taken before a judicial official and advised of his right to communicate with counsel and friends pursuant to the statute. Since defendant did not argue a causal connection between the violations of G.S. 15A-501(2) and (5) and his incriminating statements, the trial court properly denied suppressing the statements under G.S. 15A-974(2). Accordingly, we find no error.

No error.

Judges GREENE and LEWIS concur.

NATIONWIDE MUTUAL INSURANCE COMPANY v. PUBLIC SERVICE COMPANY OF NORTH CAROLINA, INCORPORATED

No. 9210SC904

(Filed 19 October 1993)

1. Insurance § 679 (NCI4th)— settlement over insured's objections—close to deductible—summary judgment for insurer

The trial court did not err by granting summary judgment for plaintiff insurer in an action to recover a \$100,000 deductible where plaintiff issued a business automobile insurance policy to defendant which provided a deductible of \$100,000; one of defendant's employees was involved in a collision with Charles Pulley while driving one of defendant's trucks; as the attorney retained by plaintiff investigated the incident, it appeared to him that it was likely that the employee would be found to be negligent and defendant would be liable; defendant continually expressed to plaintiff and the attorney that it felt that it could win the case and wished for the case to go to trial; and the suit was settled for \$101,500.00 on the morning of trial. The policy explicitly grants to the plaintiff the right to settle a claim against the insured without the

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insured's consent. Although any settlement must be made in good faith regardless of any contractual provision reserving to the insurer the exclusive right to settle a claim as it sees fit, when defendant has conceded that the settlement was reasonable there must be some allegation beyond the fact that, due to the deductible, defendant was liable for a much greater share of the settlement amount than was plaintiff.

Am Jur 2d, Insurance §§ 1394, 1399, 1414 et seq.

2. Insurance § 680 (NCI4th)— settlement by insurer—effect on insured's right to independent counsel—insurer's duty to defend

The trial court did not err by granting plaintiff insurer's motion for a summary judgment in an action to recover a \$100,000 deductible where defendant had argued that the plaintiff's failure to notify defendant of its intention to settle the suit deprived plaintiff of its right to independent counsel and breached plaintiff's duty to defend. If by some chance defendant was unaware of the conflict inherent in deductible provisions, plaintiff's letter of 13 July 1987 put defendant on notice of the conflict and of its right to an independent counsel.

Am Jur 2d, Insurance § 1415.

3. Insurance § 679 (NCI4th)— settlement close to deductible—tortious interference with fiduciary relationship—summary judgment for insurer

The trial court did not err by granting summary judgment for plaintiff insurer in an action to recover a deductible where defendant insured counterclaimed for tortious interference with the fiduciary relationship with its attorney and breach of plaintiff's fiduciary duty to defendant. Since the defendant does not dispute that the policy gave plaintiff the right to settle the case as it saw fit and defendant concedes that the settlement was reasonable, these two claims are really just attempts to raise the claim of bad faith under a different guise. There was no genuine issue of material fact as to the bad faith claim.

Am Jur 2d, Insurance §§ 1394, 1399, 1414 et seq.

Appeal by defendant from judgment entered 26 June 1991 by Judge Anthony Brannon in Wake County Superior Court. Heard in the Court of Appeals 1 September 1993.

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This appeal arises out of an action brought by plaintiff to recover from defendant \$100,000.00, which was the amount of the deductible on a claim that the plaintiff insurer had paid on behalf of the insured defendant. Defendant answered, denying that it was liable to plaintiff and alleging that plaintiff had settled the underlying lawsuit in bad faith, that plaintiff had breached its fiduciary duty to defendant, and that plaintiff had breached its contract with defendant. Defendant also brought counterclaims for breach of fiduciary duty and tortious interference with the fiduciary relationship between defendant and its attorney. After discovery, both parties moved for summary judgment, and the trial court entered an order granting summary judgment in favor of plaintiff on all claims. From this order defendant appeals.

LeBouef, Lamb, Leiby & MacRae, by Peter M. Foley, for plaintiff-appellee.

Moore & Van Allen, by George V. Hanna, III, Peter J. McGrath, Jr., and Susan E. Rowell, for defendant-appellant.

MCCRODDEN, Judge.

This case involves questions about the responsibilities an insurance company has to its insured when it negotiates the settlement of a claim against that insured. Defendant poses the questions in terms of the propriety of the trial court's entry of summary judgment in favor of plaintiff insurance company.

The facts of the case are as follows. Plaintiff issued a business automobile insurance policy to defendant providing coverage from 31 December 1985 to 31 December 1986 (the Policy). The Policy provided for coverage up to one million dollars and provided for a deductible in the amount of \$100,000.00. It also contained the following provisions:

We have the right and duty to defend any suit asking for these damages (bodily injury or property damage). However, we have no duty to defend suits for bodily injury or property damage not covered by this Policy. *We may investigate and settle any claim or suit as we consider appropriate.*

. . . .

The terms of the Policy, including those with respect to (A) the Company's rights and duties with respect to the defense

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of suits . . . apply irrespective of the application of the deductible amount.

. . . .

The Company may pay any part or all of the deductible amount and upon notification of the action taken, the named insured shall reimburse the Company for that part of the amount which has been paid by the Company . . .

. . . .

The Company's obligations to pay damages on behalf of the insured apply only to the amount of damages in excess of the deductible [amount]

(Emphasis added).

On 26 February 1986, within the period of coverage, one of defendant's employees, while driving one of defendant's trucks, was involved in a collision with Charles Pulley. Pulley suffered significant injuries in the collision, and on 19 June 1987, filed the suit that underlies this action (the Pulley action). After plaintiff received notice that defendant had been sued, plaintiff wrote to defendant's risk manager on 13 July 1987. In this letter plaintiff stated that in response to the suit it had retained a local attorney, Lee Patterson, to defend the action on behalf of the defendant insured (as well as the plaintiff insurer). The letter also contained the following passage:

[O]ur obligation to pay any damages arising from the accident which is the subject of this suit apply [sic] only to the amount of damages in excess of the deductible amount stated in the endorsement, i.e. \$100,000 Under such circumstances, you may desire to employ an attorney, at your own expense, to represent your uninsured interests, but whether you should or should not do this is a matter that rests entirely with you.

As Patterson investigated the incident, it appeared to him that it was likely that the employee would be found to be negligent and defendant would be liable. He considered the availability of the defense of contributory negligence but thought it unlikely that defendant would be able to prevail on that issue. There was no witness that could testify directly as to Pulley's speed, which might have been the basis of his contributory negligence. During Patterson's preparation of his defense, this Court decided the case *State v.*

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Purdie, 93 N.C. App. 269, 337 S.E.2d 789 (1989), which Patterson interpreted to mean that expert opinion testimony as to the speed of a vehicle, based solely on accident reconstruction evidence, is inadmissible in North Carolina.

On 27 June 1990, Patterson wrote to a representative of plaintiff to apprise plaintiff of the status of the Pulley action. Patterson described the plaintiff Pulley's injuries and expressed his opinion of the impact of the case *State v. Purdie*. Patterson felt that "[t]his case helps the plaintiff a lot more than it helps us." Patterson concluded by stating that the Pulley action was "a significant case and one with realistic substantial risks."

However, defendant continually expressed to plaintiff and Patterson that it felt that it could win the case and wished for the case to go to trial. On approximately 27 June 1990, plaintiff decided to attempt to settle the action, based in large part on its reading of *State v. Purdie*. Plaintiff did not notify defendant of its decision to try to settle the case.

At the date set for trial, 31 July 1989, the trial judge, Samuel Currin, called the parties into his chambers to encourage them to settle. Patterson contacted plaintiff and plaintiff authorized him to settle for any amount up to \$125,000.00. The suit was settled for \$101,500.00, which amount plaintiff paid to Pulley. After defendant refused to reimburse plaintiff for the amount of the deductible, plaintiff instituted this action.

[1] Defendant's first set of arguments, based upon one assignment of error, is that the trial court erred in entering summary judgment on plaintiff's claim because there was a genuine issue of material fact as to the plaintiff's breach of its obligations under its insurance policy. First, it contends that there was sufficient evidence for a jury determination of whether plaintiff breached its duty to settle the claim in good faith when it instructed Patterson, over defendant's objections, to settle the lawsuit for \$101,500.00.

A trial court properly enters summary judgment when it determines that there is no genuine issue of material fact and that one party is entitled to judgment as a matter of law. N.C. Gen. Stat. § 1A-1, Rule 56(c) (1990). "In ruling on a motion for summary judgment, the court must consider the evidence in the light most favorable to the non-movant, and give the non-movant all favorable

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inferences which may reasonably be drawn from the evidence." *Isbey v. Cooper Companies, Inc.*, 103 N.C. App. 774, 775, 407 S.E.2d 254, 256 (1991), *disc. review denied*, 330 N.C. 613, 412 S.E.2d 87 (1992) (citation omitted). Summary judgment is appropriate in cases where it is alleged that an insurer acted in bad faith. *See Gardner v. Aetna Cas. & Sur. Co.*, 841 F.2d 82 (4th Cir. 1988).

In the present case, the Policy explicitly grants to the plaintiff the right to settle a claim against the insured without the insured's consent. The parties have cited no case law, and our research has revealed none, in which an insurer was found to have acted in bad faith when it settled a case for an amount suspiciously close to the deductible amount. However, this does not mean that an insurer can act with impunity in settling such a case. Regardless of any contractual provision reserving to the insurer the exclusive right to settle a claim as it sees fit, any settlement must be made in good faith. "Where a contract confers on one party a discretionary power affecting the rights of the other, this discretion must be exercised in a reasonable manner based upon good faith and fair play." *Mezzanotte v. Freeland*, 20 N.C. App. 11, 17, 200 S.E.2d 410, 414 (1973), *cert. denied*, 284 N.C. 616, 201 S.E.2d 689 (1974). Specifically, an insurer is required to act in good faith in exercising its right to settle a claim against the insured. *Alford v. Textile Insurance Co.*, 248 N.C. 224, 229, 103 S.E.2d 8, 12 (1958). The insurer must give due regard to the interests of the insured, *see Abernethy v. Utica Mutual Insurance Company*, 373 F.2d 565 (4th Cir. 1967), but this does not mean that the insurer must give more consideration or weight to the interests of the insured than its own interests. When an insurer brings an action against its insured for indemnity, the insurer bears the burden of showing that the settlement was made in good faith. *See Insurance Co. v. Chantos*, 293 N.C. 431, 445, 238 S.E.2d 597, 607 (1977).

Defendant points to the following facts as evidence that plaintiff acted in bad faith: that plaintiff settled the underlying lawsuit for \$1500.00 above the amount of the deductible; that the settlement agreement was reached on the morning of the day the case was to be tried; that the settlement was made without notice to defendant, thereby preventing defendant from retaining another attorney; that by settling, plaintiff avoided incurring the expense of a trial; that plaintiff instructed the attorney it had retained to defend the lawsuit to settle the action despite defendant's protestations;

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and that the plaintiff's reliance on the case *State v. Purdie* was a mere justification for its decision to settle the case.

We find that these allegations are insufficient to withstand a motion for summary judgment. The essence of defendant's complaint is that it was obligated to pay \$100,000.00, while plaintiff only was obligated to pay \$1500.00 toward the settlement. Defendant concedes both that the Policy gave plaintiff the right to settle the lawsuit without defendant's consent and that the settlement was reasonable. Whenever there is a deductible provision in an insurance contract, there is the potential for a conflict between the insurer and the insured. See *American Home Assurance Co., Inc. v. Hermann's Warehouse Corp.*, 563 A.2d 444 (N.J. 1989). Even though plaintiff bore the burden of proving that it acted in good faith in settling the action, we believe that when defendant has conceded that the settlement was reasonable, there must be some allegation beyond the fact that, due to the deductible, defendant was liable for a much greater share of the settlement amount than the plaintiff was. In the absence of such an allegation, we find that there was no issue of material fact as to plaintiff's good faith in settling the Pulley action and reject defendant's first argument.

[2] Defendant next argues that the plaintiff's failure to notify defendant of its intention to settle the suit prior to the settlement deprived defendant of its right to independent counsel and breached plaintiff's duty to defend. We disagree. From the outset, plaintiff made defendant aware of its right to independent counsel. However, defendant asserts that it was unaware that defendant and plaintiff's interests were different until it learned of plaintiff's intention to settle the suit. As stated above, any time there is a deductible provision in an insurance policy, there is an inherent conflict. We believe that, if by some chance defendant was unaware of the conflict inherent in deductible provisions, plaintiff's letter of 13 July 1987 put defendant on notice of the conflict and of its right to an independent counsel. We, therefore, reject defendant's second argument within this assignment of error.

[3] Defendant's second set of arguments, based upon another assignment of error, is that the trial court erroneously granted summary judgment on defendant's counterclaim for tortious interference with a fiduciary relationship. It contends that there was a genuine issue of material fact as to (a) the claim against plaintiff for its interference

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with the fiduciary relationship between defendant and its attorney and (b) the claim that plaintiff breached its fiduciary duty to defendant. We reject both of these contentions.

Since the defendant does not dispute that the Policy gave plaintiff the right to settle the case as it saw fit and defendant concedes that the settlement was reasonable, these two claims are really just attempts to raise the claim of bad faith under a different guise. See *Gardner v. Aetna Cas. & Ins. Co.*, 841 F.2d 82, 87 (where the Court found: "no improper interference simply because Aetna ordered . . . [the attorney] to take an action that was within the scope of Aetna's contractual rights. Appellant's assertion of contractual interference is but a thinly disguised effort to resurrect his bad faith claim in another context."). The action about which defendant is really complaining is plaintiff's instructing Patterson to settle despite its wishes. Since the Policy gave the plaintiff the right to do this and since the only way that plaintiff, which was not a party to the Pulley action, could exercise its right to settle the action was to instruct Patterson to do so, the only complaint that defendant might have about the settlement would be that it was made in bad faith. We reiterate our previously stated holding that there was no genuine issue of material fact as to the bad faith claim and reject defendant's third and fourth arguments.

We hold that summary judgment was properly entered in favor of plaintiff as to each of the claims and affirm the order of the trial court.

Affirmed.

Judges Wells and Orr concur.

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LAWYERS MUTUAL LIABILITY INSURANCE COMPANY OF NORTH CAROLINA, PLAINTIFF v. NEXSEN PRUET JACOBS & POLLARD, MOORE & VAN ALLEN AND THE HOME INSURANCE COMPANY, DEFENDANTS

No. 9210SC991

(Filed 19 October 1993)

1. Courts § 19 (NCI4th) — determination of insurance coverage — similar proceedings in South Carolina — stay

There was no abuse of discretion in granting a stay under N.C.G.S. § 1-75.12 in an action to determine insurance coverage while a similar action proceeded in South Carolina where North Carolina had no connection to the underlying claims; Lawyers Mutual insured South Carolina lawyers against professional liability, thereby insuring South Carolina residents; the convenience of the witnesses and the availability of compulsory process to obtain witnesses clearly weighed in favor of staying the North Carolina action; the facts and circumstances surrounding Lawyers Mutual's defense occurred in South Carolina and South Carolina law applied to the coverage issues; and the South Carolina court currently handling the malpractice claims is a more convenient forum for handling the declaratory judgment. The standard of review for the granting of a stay under N.C.G.S. § 1-75.12 is whether the trial court abused its discretion rather than a review *de novo*, the facts support the trial court's conclusion that it would work a substantial injustice for the action to be tried in a North Carolina court, and the Court of Appeals found no abuse of discretion.

Am Jur 2d, Actions §§ 95, 96.**Stay of civil proceedings pending determination of action in another state or country. 19 ALR2d 301.****2. Courts § 19 (NCI4th) — action in foreign jurisdiction — stay in North Carolina — standard**

The factors listed in *Motor Inn Management, Inc. v. Irvin-Fuller Dev. Co., Inc.*, 46 N.C. App. 707, for granting a stay under N.C.G.S. § 1-75.12 are permissive, not mandatory, and a court will not have abused its discretion in failing to consider each enumerated factor. Further, it is not necessary that the trial court find that *all* factors positively support a stay, as long as it is able to conclude that (1) a substantial injustice

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would result if the trial court denied the stay, (2) the stay is warranted by those factors present, and (3) the alternative forum is convenient, reasonable, and fair. A court will have abused its discretion if it abandons any consideration of these factors.

Am Jur 2d, Actions § 97.**3. Courts § 19 (NCI4th)— foreign proceeding—N.C. action stayed—no violation of open courts**

The trial court's application of N.C.G.S. § 1-75.12 to stay a North Carolina action while a related action proceeded in South Carolina did not violate the open courts provision of Article I, § 18 of the North Carolina Constitution because the stay statute does not deny litigants access to North Carolina courts, but merely *postpones* litigation here pending the resolution of the same matter in another sovereign court.

Am Jur 2d, Actions §§ 92, 99.

Appeal by plaintiff from order entered 7 July 1992 by Judge Robert L. Farmer in Wake County Superior Court. Heard in the Court of Appeals 15 September 1993.

This appeal questions the propriety of an order granting Nexsen Pruet Jacobs & Pollard's (Nexsen Pruet) motion to stay proceedings in North Carolina to permit the trial of similar issues pending in South Carolina. Nexsen Pruet is a law partnership with its principal office in Columbia, South Carolina. In August 1987, Nexsen Pruet merged briefly with Moore & Van Allen, a law partnership with its principal office in Charlotte, North Carolina. This merger lasted until 30 June 1988 and effective 1 July 1988 the two firms demerged.

The Home Insurance Company (Home) insured Nexsen Pruet prior to the merger. Lawyers Mutual Liability Insurance Company (Lawyers Mutual) insured Moore & Van Allen both prior to, during, and after the merger. In anticipation of the merger, Nexsen Pruet applied to Lawyers Mutual seeking to have their firm members, located in South Carolina, insured under Moore & Van Allen's Lawyers Mutual policy. Lawyers Mutual agreed and added Nexsen Pruet's staff through an endorsement to the pre-existing Moore & Van Allen policy. In January 1988, the merged firm applied for and received a renewal policy, effective 1 February 1988 to

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1 February 1989. Following demerger, an arrangement was made with Lawyers Mutual to continue coverage for both firms until the renewal policy expired naturally in February 1989. Beginning 1 February 1989, Nexsen Pruet resumed coverage under a Home policy.

In December 1988, Nexsen Pruet notified Lawyers Mutual that a potential claim (hereinafter the "Charging Suit") existed, arising out of work done by a member of their firm. In January 1989, Nexsen Pruet notified Lawyers Mutual of an additional potential claim (hereinafter the "Equity Capital Suit"), arising out of the same transaction or series of transactions that gave rise to the Charging Suit. Both Lawyers Mutual and Home have asserted that their policies do not cover either the Charging Suit or the Equity Capital Suit, both of which were filed in South Carolina against Nexsen Pruet, Moore & Van Allen, and Edward Menzie. Lawyers Mutual did, however, retain defense counsel to represent the parties in the South Carolina lawsuits while reserving its rights disputing coverage. On 24 February 1992, Lawyers Mutual filed a complaint in North Carolina seeking a declaration of coverage rights under the pertinent malpractice policies. On 3 March 1992, Nexsen Pruet filed a comparable action in South Carolina, again, seeking a declaration of coverage rights under all pertinent malpractice policies. On 23 April 1992, Nexsen Pruet filed a motion seeking a stay of this declaratory action to permit trial of the parallel action pending in South Carolina. On 13 May 1992, the South Carolina court denied a similar motion made by Lawyers Mutual to stay the South Carolina declaratory judgment action. All parties, excluding Lawyers Mutual, have consented to suit in South Carolina and have supported Nexsen Pruet's motion to stay the North Carolina proceedings. From the order granting Nexsen Pruet's motion to stay the North Carolina action, Lawyers Mutual appeals.

Young, Moore, Henderson & Alvis, P.A., by Walter E. Brock, Jr., for plaintiff appellant.

Smith, Helms, Mullis & Moore, by Martin N. Erwin, for defendant appellee, The Home Insurance Company.

Manning, Fulton & Skinner, by Howard E. Manning, Jr., for defendant appellee, Nexsen Pruet Jacobs & Pollard.

Yates, McLamb & Weyher, by Joseph W. Yates, III, and Barbara B. Weyher, for defendant appellee, Moore & Van Allen.

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ARNOLD, Chief Judge.

[1] In its first of two assignments of error, Lawyers Mutual contends the trial court abused its discretion in staying the North Carolina declaratory judgment action. The trial court granted the stay pursuant to N.C. Gen. Stat. § 1-75.12 (1983), which provides as follows:

(a) When Stay May Be Granted.—If, in any action pending in any court of this State, the judge shall find that it would work substantial injustice for the action to be tried in a court of this State, the judge on motion of any party may enter an order to stay further proceedings in the action in this State. A moving party under this subsection must stipulate his consent to suit in another jurisdiction found by the judge to provide a convenient, reasonable and fair place of trial.

Lawyers Mutual first argues this Court must reassess the standard by which orders under G.S. § 1-75.12 are reviewed. In *Home Indemnity Co. v. Hoechst-Celanese Corp.*, 99 N.C. App. 322, 393 S.E.2d 118, *appeal dismissed and disc. review denied*, 327 N.C. 428, 396 S.E.2d 611 (1990), this Court refused to adopt a *de novo* standard of review, stating that “[e]ntry of an order under G.S. 1-75.12 is a matter within the sound discretion of the trial judge and will not be disturbed on appeal absent an abuse of that discretion.” *Id.* at 325, 393 S.E.2d at 120. We decline to change that standard.

Lawyers Mutual also argues that, even under an abuse of discretion standard, the trial court committed error. In determining whether to grant a stay under G.S. § 1-75.12, the trial court may consider the following factors: (1) the nature of the case, (2) the convenience of the witnesses, (3) the availability of compulsory process to produce witnesses, (4) the relative ease of access to sources of proof, (5) the applicable law, (6) the burden of litigating matters not of local concern, (7) the desirability of litigating matters of local concern in local courts, (8) convenience and access to another forum, (9) choice of forum by plaintiff, and (10) all other practical considerations. *Motor Inn Management, Inc. v. Irvin-Fuller Dev. Co., Inc.*, 46 N.C. App. 707, 713, 266 S.E.2d 368, 371, *appeal dismissed and disc. review denied*, 301 N.C. 93, 273 S.E.2d 299 (1980).

We have reviewed the trial court’s order. The trial court found that the underlying actions seeking damages from Nexsen Pruet and Moore & Van Allen arise solely out of Nexsen Pruet’s represen-

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tation of Charping and the Charping companies in South Carolina. North Carolina has no connection to these claims. The trial court also found that Lawyers Mutual insured South Carolina lawyers against professional liability, thereby insuring South Carolina residents. Moreover, it found that the convenience of the witnesses and the availability of compulsory process to obtain witnesses clearly weighed in favor of staying the North Carolina action. The trial court also found that the facts and circumstances surrounding Lawyers Mutual's defense to coverage occurred in South Carolina and that South Carolina law applied to the coverage issues. Finally, the trial court found the South Carolina court currently handling the malpractice claims to be a more convenient forum for handling the declaratory judgment as well. The trial court then concluded that it would work a substantial injustice for the action to be tried in a North Carolina court and granted Nexsen Pruet's motion to stay. We hold that the facts of this case support this conclusion and find no abuse of the court's discretion.

[2] Lawyers Mutual also assigns as error the failure of the trial court to consider each and every factor listed above. We disagree, noting that the Court in *Motor Inn Management* stated "relevant factors, among others, that *may* be considered . . ." *Motor Inn Management, Inc.*, 46 N.C. App. at 713, 266 S.E.2d at 371 (emphasis added). This language is permissive, not mandatory. A court will not have abused its discretion in failing to consider each enumerated factor. We decline to bind the trial courts to a rigid checklist in determining whether to grant a stay, preferring to maintain the flexibility advocated in *Motor Inn Management*. A court will have abused its discretion, however, if it abandons any consideration of these factors which this Court has deemed relevant in determining whether a stay is warranted. Further, in determining whether to grant a stay, it is not necessary that the trial court find that *all* factors positively support a stay, as long as it is able to conclude that (1) a substantial injustice would result if the trial court denied the stay, (2) the stay is warranted by those factors present, and (3) the alternative forum is convenient, reasonable, and fair.

[3] In its second assignment of error, Lawyers Mutual contends the trial court's application of G.S. § 1-75.12 violated the North Carolina Constitution's "open courts" provision. This provision reads as follows:

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All courts shall be open; every person for an injury done him in his lands, goods, person, or reputation shall have remedy by due course of law; and right and justice shall be administered without favor, denial or delay.

N.C. Const., Art. I, § 18. Lawyers Mutual argues the stay both (1) deprives a North Carolina plaintiff of real access to our courts, and (2) prevents the administration of justice without delay, as required by our Constitution. We are bound by, and agree with, this Court's decision in *Home Indemnity*, where this Court stated "the stay statute does not deny litigants access to North Carolina courts, but merely *postpones* litigation here pending the resolution of the same matter in another sovereign court." *Home Indemnity Co.*, 99 N.C. App. at 326, 393 S.E.2d at 121. We also fail to see how Lawyers Mutual is being delayed justice where an identical action is proceeding in South Carolina.

Accordingly, the order staying the North Carolina proceeding to permit trial in South Carolina is

Affirmed.

Judges WYNN and JOHN concur.

CONNIE S. TRUE AND DAVID R. TRUE, SR. v. T & W TEXTILE MACHINERY,
INC. AND WALTER REUBIN PITTS

No. 9226SC633

(Filed 19 October 1993)

Costs § 11 (NCI4th)— settlement offer—multiple parties, independent claims—not sufficient to invoke Rule 68—court's discretionary authority

A settlement offer of \$25,000 was not sufficient to invoke the charging of costs under N.C.G.S. § 1A-1, Rule 68, but the court did have the discretionary authority to award costs under N.C.G.S. § 6-20, where plaintiff Mrs. True was injured in an automobile accident with defendant; the plaintiffs filed a single suit claiming personal injuries for Mrs. True and loss of consortium for Mr. True; defendants filed an offer of judg-

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ment under N.C.G.S. § 1A-1, Rule 68 of \$25,000, which plaintiffs rejected; the jury returned a verdict of \$22,000 on the personal injury claim and \$1.00 on the loss of consortium claim; and the court ordered plaintiffs to pay court costs. When multiple plaintiffs in the same complaint have independent claims for relief, an offer of judgment can be valid only if it is specific as to the offer made to each plaintiff. However, the trial court did have full authority to tax costs to plaintiffs through its discretionary powers pursuant to N.C.G.S. § 6-20, the order indicates that the court exercised its discretion in denying the motion, and there is nothing in the record to reflect an abuse of discretion.

Am Jur 2d, Costs § 24.

Appeal by plaintiffs from judgment entered 9 April 1992 by Judge Robert M. Burroughs in Mecklenburg County Superior Court. Heard in the Court of Appeals 13 May 1993.

Richard F. Harris, III, for plaintiffs-appellants.

Hedrick, Eatman, Gardner & Kincheloe, by John P. Barringer, for defendants-appellees.

WYNN, Judge.

This appeal and the underlying lawsuit arise out of an automobile accident which occurred in Charlotte, N.C. on 5 April 1988. Plaintiff, Connie S. True was involved in a collision with defendant, Walter Reubin Pitts. Pitts was driving a vehicle during the course and scope of his employment with defendant T & W Textile Machinery, Inc. On 10 May 1990, plaintiffs (True and her husband) filed a single suit against the defendants. The first claim was for the personal injuries of Mrs. True and the second claim alleged loss of consortium on Mr. True's behalf. Defendants timely filed an answer and subsequently filed an offer of judgment pursuant to Rule 68 of the North Carolina Rules of Civil Procedure, in the amount of \$15,500. On 11 February 1992, defendants filed a second offer of judgment in the amount of \$25,000. Plaintiffs refused the offers. The case was tried to a jury and the jury returned a verdict of \$22,000 on the personal injury claim and \$1.00 on the loss of consortium claim. Plaintiffs thereafter filed a motion to tax costs to defendants. The trial judge denied plaintiffs' motion and entered judgment ordering the defendants to pay the filing fee of \$56 and

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the \$22,001 in accordance with the jury verdict plus interest from the date the complaint was filed through 11 February 1992, the date the second offer of judgment was filed. The trial judge ordered plaintiffs to pay court costs, including expert witness fees of \$3,965 and \$95 in subpoenas. From the entry of judgment, plaintiffs appeal.

I.

Plaintiffs' sole assignment of error on appeal alleges that the trial judge erred by denying their motion to tax costs to defendants. Plaintiffs allege that the offer of judgment for \$25,000 was insufficient to invoke N.C. Gen. Stat. § 1A-1, Rule 68, because the offer did not specify how much of the \$25,000 was being offered on each of the plaintiffs' two separate claims. We agree.

Pursuant to Rule 68(a), "a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against him" If an offer to allow judgment is not accepted, and "the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer." N.C. Gen. Stat. § 1A-1, Rule 68(a) (1990). See *Scallon v. Hooper*, 58 N.C. App. 551, 293 S.E.2d 843, *disc. rev. denied*, 306 N.C. 744, 295 S.E.2d 480 (1982). "The purpose of Rule 68 is to encourage settlements and avoid protracted litigation." *Id.* at 554, 293 S.E.2d at 844.

In this case, however, defendants made a nonspecific offer for both plaintiffs to take judgment against defendants for a total sum of \$25,000. This procedure may be appropriate when multiple plaintiffs are joined in one claim for relief. When, however, multiple plaintiffs in the same complaint have independent claims for relief, as in this case, an offer of judgment can be valid only if it is specific as to the offer made to each plaintiff. A party wishing to accept the offer should not be barred from doing so, and thus subject himself to penalties under Rule 68, just because the other party will not accept. This is exactly the position in which each plaintiff was placed in this case. We, therefore, find that under the facts of this case, the trial court did not have authority under Rule 68 to tax costs to the plaintiffs.

However, the trial court did have full authority to tax costs to plaintiffs through its discretionary powers, pursuant to N.C. Gen. Stat. § 6-20. N.C. Gen. Stat. § 6-20 (1986) provides that in actions such as this one, "costs may be allowed or not, in the

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discretion of the court, unless otherwise provided by law." Where the court has taxed costs in a discretionary manner its decision is not reviewable. *Dixon, Odom & Co. v. Sledge*, 59 N.C. App. 280, 286, 296 S.E.2d 512, 516 (1982) (citing *Hoskins v. Hoskins*, 259 N.C. 704, 131 S.E.2d 326 (1963)). Furthermore, N.C. Gen. Stat. § 7A-314(d) (1989) specifically provides that the decision to award expert witness fees lies within the trial court's discretion. See, e.g., *Campbell ex rel. McMillan v. Pitt County Memorial Hosp., Inc.*, 84 N.C. App. 314, 352 S.E.2d 902, *aff'd*, 321 N.C. 260, 362 S.E.2d 273 (1987).

In this case, the trial court's order denying plaintiffs' motion to tax costs to defendants states: "the court has considered the law and equity of the situation as well as the relevant material in the official court file and finds that the plaintiffs' motion should be denied." The order indicates that the court exercised its discretion in denying the motion. There is nothing in the record to reflect an abuse of discretion. Accordingly, the trial court's order denying plaintiffs' motion to tax costs to defendants and final judgment is

Affirmed.

Judges JOHNSON and GREENE concur.

IN THE MATTER OF: ORDER OF FORFEITURE OF \$5480 SEIZED FROM RICHARD SNEED, JR. (THE JUDGMENT OF RECORD REFLECTS THE PROPER CAPTION AS: STATE OF NORTH CAROLINA v. RICHARD SNEED, JR.)

No. 922SC1129

(Filed 19 October 1993)

**Appeal and Error § 68 (NCI4th)— cash seized in drug arrest—
garnishment by Department of Revenue—standing of Department to appeal**

The Department of Revenue lacked standing to appeal from a judgment of imprisonment for possession of cocaine with intent to sell and deliver and possession of drug paraphernalia which included an order that cash seized during the arrest be forfeited and delivered to the School Board of Beaufort County. Since the Department of Revenue is not a party to

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the underlying criminal action, it had no right to appeal a forfeiture order contained in the judgment in the criminal action. N.C.G.S. § 1-271.

Am Jur 2d, Appeal and Error § 173.

Appeal by the State of North Carolina, Department of Revenue, from a judgment entered in Beaufort County Superior Court by Judge W. Russell Duke, ordering, *inter alia*, forfeiture and delivery of \$5,480.00 to the School Board of Beaufort County. Heard in the Court of Appeals 6 October 1993.

On 6 February 1992, Richard Sneed, Jr. was arrested on charges of possession with intent to sell and deliver cocaine and possession of drug paraphernalia. At the time of the arrest, the arresting officers found \$5,480.00 in Mr. Sneed's possession. On that same day, the Department of Revenue served on Mr. Sneed a Notice of Tax Assessment of \$8,030.00 and filed a certificate of tax liability with the Clerk of the Superior Court of Beaufort County. The Department of Revenue also served D.G. Crouch, one of the arresting officers, with a notice of garnishment in the amount of \$8,030.00.

Mr. Sneed pled guilty to possession with intent to sell and deliver cocaine and possession of drug paraphernalia. The trial court sentenced Mr. Sneed to ten years imprisonment and, as part of that judgment, ordered the \$5,480.00 seized from Mr. Sneed to be forfeited and delivered to the School Board of Beaufort County. The Department of Revenue filed notice of appeal from that judgment on 25 August 1992.

Attorney General Lacy H. Thornburg, by Associate Attorney General Christopher E. Allen, for appellant State of North Carolina.

Lee E. Knott, Jr. for appellee Beaufort County Board of Education.

WELLS, Judge.

The Beaufort County School Board contends that the Department of Revenue lacks standing to appeal from the judgment entered by the trial court. We agree.

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Section 1-271 of the North Carolina General Statutes provides: "Any party aggrieved may appeal in the cases prescribed in this Chapter." According to our Supreme Court, "[o]ne who is not a party to an action or who is not privy to the record is not entitled to appeal from the judgment of the lower court." *In re Brownlee*, 301 N.C. 532, 272 S.E.2d 861 (1981).

In *Brownlee*, Wake County attempted to appeal an order entered by the district court in a juvenile proceeding directing the county to pay for the juvenile's treatment. Our Supreme Court held that because Wake County was not a party to the juvenile proceeding it did not have a right to appeal.

The case *sub judice* is a criminal action involving the possession of controlled substances, and, as in *Brownlee*, it is clear in this case that the governmental agency attempting to appeal, the Department of Revenue, is not a party to the judgment ordering the forfeiture of \$5,480.00. Since the Department of Revenue is not a party to the underlying criminal action, it had no right to appeal a forfeiture order contained in the judgment in this criminal action. *Id.*; *In re Wharton*, 54 N.C. App. 447, 283 S.E.2d 528 (1981), *rev'd in part on other grounds*, 305 N.C. 565, 290 S.E.2d 688 (1982). Therefore, the appeal must be dismissed.

We note that, in filing the record on appeal, the attorney for the Department of Revenue made an unauthorized change in the caption of this case in violation of the Rules of Appellate Procedure.

Rule 26(g) of the North Carolina Rules of Appellate Procedure provides that "[t]he format of all papers presented for filing shall follow the instructions found in the Appendixes to these Appellate Rules," and Appendix B provides that "[t]he caption should reflect the title to the action (all parties named) as it appeared in the trial division."

The judgment and commitment ordering the forfeiture is entitled "State of North Carolina v. Richard Sneed, Jr., aka Richard Sneed, Jr." and bears the docket number 92CRS761;830. Consequently, this case was incorrectly titled "In the Matter of: Order of Forfeiture of \$5480 Seized from Richard Sneed, Jr." The proper caption is "State of North Carolina v. Richard Sneed, Jr., and the proper docket number is 92CRS761. Our opinion will reflect this correction.

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For the reasons stated, this appeal is

Dismissed.

Judges LEWIS and MARTIN concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 5 OCTOBER 1993

BROWN v. WEBB No. 924DC590	Jones (91CVD120)	Affirmed
FAIN v. FAIN No. 9221DC968	Forsyth (92CVD2581)	Affirmed
GIBBS v. GILMORE No. 922SC416	Hyde (90CVS9)	Affirmed
HARTLEY v. HARTLEY No. 923DC911	Craven (91CVD232)	Affirmed
IN RE KRAMMES No. 9211DC1014	Harnett (92J42)	Affirmed
LANKFORD v. EDWARDS No. 9217DC960	Surry (91CVD1081)	Affirmed
LEE v. LEE No. 9318DC17	Guilford (90CVD9001)	Affirmed
LEWIS v. LEWIS No. 9212DC876	Cumberland (91CVD6636)	Affirmed
MILLER v. MEIS No. 9321SC41	Forsyth (88CVS4414)	Order entered 31 March 1990 – affirmed. Judgment entered 10 June 1992 – no error.
ROGERS v. LUMBEE RIVER ELECTRIC MEMBERSHIP CORP. No. 9216SC882	Robeson (91CVS00748)	Reversed & Remanded
STATE v. CHAVIS No. 9220SC1027	Richmond (91CRS3939) (91CRS3940) (91CRS3941) (91CRS3943)	No Error
STATE v. HIGH No. 9113SC1158	Brunswick (89CRS3383) (89CRS3384) (89CRS3385) (89CRS3386) (89CRS3387)	No Error
STATE v. WHITE No. 921SC507	Currituck (90CRS161) (90CRS162)	No Error in trial; remand for resentencing.

TABANO v. MIDGETT No. 921SC976	Dare (87CVS446)	Dismissed
WAKE COUNTY ex rel. HORTON v. RYLES No. 9210DC837	Wake (92CVD2104)	Appeal Dismissed
WILSON v. WORLEY No. 928DC334	Wayne (88CVD1509)	Affirmed
WORSHAM v. WORSHAM No. 921DC1003	Pasquotank (81CVD231)	Affirmed

FILED 19 OCTOBER 1993

GRASTY v. McGAHA No. 9330SC355	Haywood (91SP188)	No Error
HANSEN v. VAN WYK, INC. No. 9229SC731	McDowell (89CVS582)	Reversed & Remanded
NASH COUNTY DEPT. OF SOCIAL SERVICES v. MILLER No. 927DC1151	Nash (91CVD1408)	Reversed & Remanded
NORTH BUNCOMBE ASSOC. OF CONCERNED CITIZENS v. N.C. DEPT. OF E.H.N.R. No. 9128SC1205	Buncombe (91CVS1940)	Reversed & Remanded
NORTH CENTRAL LEGAL ASSISTANCE PROGRAM v. CALHOUN No. 9114SC1186	Durham (89CVS4715)	Reversed in part, affirmed in part
RESOLUTION TRUST CORP. v. SCHEFFEY No. 925SC925	New Hanover (90CVS3019)	Affirmed in part, vacated in part & remanded
STATE v. CHURCH No. 9315SC333	Alamance (91CRS22687)	No Error
STATE v. COVINGTON No. 9318SC317	Guilford (92CRS49935) (92CRS49936)	No Error
STATE v. EDWARDS No. 9226SC984	Mecklenburg (91CRS90142)	No Error
STATE v. HOOPER No. 9230SC1028	Macon (91CRS1665)	No Error

STATE v. STINSON No. 9225SC94	Catawba (91CRS3838)	No Error
STATE v. WELBORN No. 9322SC330	Alexander (92CRS1137)	No Error
STATE ex rel. GUPTON v. MURPHY No. 939DC62	Franklin (92CVD305)	Reversed & Remanded
STATE OF N.C. v. T. A. LOVING CO. No. 9210SC957	Wake (89CVS1910)	Affirmed

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IN THE MATTER OF: THE APPEAL OF JOE BARBOUR FROM THE DECISION OF THE NORTH CAROLINA PROPERTY TAX COMMISSION EXCLUDING FROM TAXATION CERTAIN PROPERTY OWNED BY LUTHERAN RETIREMENT MINISTRIES, INC., AND DOING BUSINESS AS "TWIN LAKES CENTER"

No. 9210PTC570

(Filed 2 November 1993)

1. Constitutional Law § 52 (NCI4th)— constitutionality of statute—standing of property owner to challenge

As a property owner who owned his property for a private personal residence, appellant had standing to challenge the constitutionality of N.C.G.S. § 105-275(32), which exempted from taxation property owned by certain homes for the aged, sick, or infirm, on the basis that the statute discriminated against the class of individual residential property owners who own their property for private personal residences and are not exempt under the statute from taxation; however, appellant lacked standing to challenge the statute on the basis that it discriminated against non-religious, non-Masonic homes for the aged, sick, or infirm, since he was not a member of that class.

Am Jur 2d, Constitutional Law § 190.

2. Constitutional Law § 91 (NCI4th); Taxation § 2.3 (NCI3d)— tax-exempt status for homes for aged and infirm—no discrimination against individual property owners—no violation of rule of uniformity in taxation

N.C.G.S. § 105-275(32), which grants tax-exempt status to certain homes for the aged, sick, or infirm, does not discriminate against individual property owners who own their property for residential purposes in violation of the rule of uniformity in taxation established under N.C. Const. art. V, § 2, since the classification of homes for the aged, sick, or infirm is neither arbitrary nor capricious.

Am Jur 2d, Constitutional Law §§ 756, 757; State and Local Taxation § 162.

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3. Constitutional Law § 91 (NCI4th); Taxation § 2.3 (NCI3d) — tax exemption for homes for aged or infirm — no discrimination against individual property owners — legitimate state interest — rational relationship between exemption and state interest

There was no merit to appellant's contention that N.C.G.S. § 105-275(32), which exempted from taxation certain homes for the aged, sick, or infirm, violated the equal protection clause of N.C. Const. art. I, § 19 by discriminating against individual residential property owners, since promoting the safety and welfare of the aged or infirm is a legitimate state objective; the exemption from taxation of these certain homes and the property used to run them has some rational relationship to this legitimate state interest; and the distinction between "homes for the aged, sick, or infirm" and individual property owners under the statute is not unconstitutional.

Am Jur 2d, Constitutional Law §§ 756, 757; State and Local Taxation § 176.

Appeal by Joe Barbour from a decision of the Property Tax Commission entered 23 January 1992 affirming the decision of the Alamance County Board of Commissioners. Heard in the Court of Appeals 29 April 1993.

Joseph P. Barbour, pro se, appellant.

Poyner & Spruill, by J. Phil Carlton and Susanne F. Hayes, for appellee Lutheran Retirement Ministries of Alamance County, Inc.

Amicus Curiae Brief filed by Jordan, Price, Wall, Gray & Jones, by Robert R. Price and Karen G. Z. Macklin, for North Carolina Association of Non-Profit Homes for the Aging.

ORR, Judge.

In August of 1987, the Alamance County Board of Commissioners (the "Board") granted Lutheran Retirement Ministries of Alamance County ("LRM") its application for property tax exclusion pursuant to N.C. Gen. Stat. § 105-275(32). On 8 September 1987, Joe Barbour, a member of the Board, submitted an application for hearing with the North Carolina Property Tax Commission (the "Commission") challenging the Board's decision and alleging that LRM had failed to meet the exemption requirements of G.S.

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§§ 105-275 and -278.6. On 9 October 1987, the Commission allowed LRM's application for intervention in Barbour's appeal. After a hearing, on 23 January 1992, the Commission entered an order affirming the Board's decision. From this order, Barbour appeals.

In April 1992, Barbour served LRM with his proposed record on appeal bringing forth three assignments of error. Pursuant to N.C. R. App. P. 18(d)(2), LRM filed and served its Notice of Objections and Amendments to the Proposed Record on Appeal. In its Notice, LRM asserted that Barbour's proposed record did not conform to N.C. R. App. P. 18(c) and that the record did not include the "whole record" including the verbatim transcript and all the exhibits presented as evidence at the hearing in front of the Commission.

On 3 June 1992, the Chairman of the Commission entered an order settling the record on appeal. In this order, the Chairman stated that Barbour agreed to abandon the issues raised in his first two assignments of error. Based on this agreement, the order modified the record to exclude the exhibits presented at the hearing before the Commission and the verbatim transcript of the hearing.

Subsequently, Barbour filed the record on appeal with this Court. The record which Barbour filed included the financial statements of LRM for 1989-1990, differential analysis of fees in North Carolina for continuing care facilities as presented by LRM, portions of an admission packet for continuing care, a graph for charitable work presented by LRM, the Property Tax Bulletin Number 79 by the Institute of Government and a videotape depicting portions of the subject property. The Commission had ordered all of these items specifically excluded from the record in its order settling the record on appeal.

On 22 June 1992, LRM filed a motion pursuant to N.C. R. App. P. 9(b)(2), (5) and N.C. R. App. P. 25 for this Court to reform the record on appeal or to sanction Barbour for disregarding the order settling the record on appeal. This Court granted the portion of the motion to reform the record but declined to impose sanctions. Thus, in deciding this action, this Court did not consider those exhibits that should have been excluded from the record on appeal, and we limited our decision to the sole issue of whether N.C. Gen. Stat. § 105-275(32) is unconstitutional on its face.

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In the record, Barbour challenges the constitutionality of G.S. § 105-275(32) under the North Carolina Constitution, specifically quoting from Article I, § 19 that “[n]o person shall be denied the equal protection of the laws” and from Article V, § 2 that “[n]o class of property shall be taxed except by uniform rule”. No other constitutional grounds are specifically set out in the record or alluded to in Barbour’s notice of appeal to the Commission. In his brief, however, Barbour argues additionally that this statute violates the federal constitution. Under N.C. Gen. Stat. § 105-345.2(c), Barbour is not permitted to rely upon any grounds for relief on appeal which were not set forth specifically in his notice of appeal filed with the Commission. Additionally, Barbour has failed to cite any authority for his claim that this statute violates the federal constitution. Accordingly, any claims that G.S. § 105-275(32) violates the federal constitution are deemed abandoned. *See* N.C. R. App. P. 28(b)(5). Thus, the only issue on appeal is whether N.C. Gen. Stat. § 105-275(32) is unconstitutional on its face under the North Carolina Constitution.

I.

N.C. Gen. Stat. § 105-275(32) exempts from taxation “[r]eal and personal property owned by a home for the aged, sick, or infirm, that is exempt from tax under Article 4 of [Chapter 105], and is used in the operation of that home.” Under this statute, the home must be a “self-contained community that”

(i) is designed for elderly residents; (ii) operates a skilled nursing facility, an intermediate care facility, or a home for the aged; (iii) includes residential dwelling units, recreational facilities, and service facilities; (iv) the charter of which provides that in the event of dissolution, its assets will revert or be conveyed to an entity organized exclusively for charitable, educational, scientific, or religious purposes, and which qualifies as an exempt organization under Section 501(c)(3) of the Internal Revenue Code of 1986; (v) is owned, operated, and managed by one of the following entities:

A. A congregation, parish, mission, synagogue, temple, or similar local unit of a church or religious body;

B. A conference, association, division, presbytery, diocese, district, synod, or similar unit of a church or religious body;

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C. A Masonic organization whose property is excluded from taxation pursuant to G.S. 105-275(18); or

D. A nonprofit corporation governed by a board of directors at least a majority of whose members elected for terms commencing on or before December 31, 1987, shall have been elected or confirmed by, and all of whose members elected for terms commencing after December 31, 1987, shall be selected by, one or more entities described in A., B., or C. of this subdivision, or organized for a religious purpose as defined in G.S. 105-278.3(d)(1); and

(vi) has an active program to generate funds through one or more sources, such as gifts, grants, trusts, bequests, endowment, or an annual giving program, to assist the home in serving persons who might not be able to reside at the home without financial assistance or subsidy.

N.C. Gen. Stat. § 105-275(32) (1992).

II.

Barbour contends that N.C. Gen. Stat. § 105-275(32) is unconstitutional in that it violates the equal protection clause of N.C. Const. art. I, § 19 and the uniform rule of taxation under N.C. Const. art. V, § 2(1), (2). Specifically, Barbour argues that this statute discriminates against: (1) individual property owners who own their property for personal residential purposes, and (2) homes for the aged, sick, or infirm that are non-religious and non-Masonic.

[1] Before we can address these arguments, however, we must address Barbour's standing to bring this constitutional challenge. Our Supreme Court analyzed the question of standing in *Stanley v. Department of Conservation and Dev.*, 284 N.C. 15, 199 S.E.2d 641 (1973). The Court stated:

Under our decisions "[o]nly those persons may call into question the validity of a statute who have been injuriously affected thereby in their persons, property or constitutional rights." . . . The rationale of this rule is that only one with a genuine grievance, one personally injured by a statute, can be trusted to battle the issue. "The 'gist of the question of standing' is whether the party seeking relief has 'alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentations

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of issues upon which the court so largely depends for illumination of difficult constitutional questions.’”

Id. at 28, 199 S.E.2d at 650 (citations omitted). Further,

“A taxpayer injuriously affected by a statute may generally attack its validity. Thus, he may attack a statute which . . . exempts persons or property from taxation, or imposes on him in its enforcement an additional financial burden, however slight.”

Id. at 29, 199 S.E.2d at 651 (citation omitted).

If a person is attacking the statute on the basis that the statute is discriminatory, however, the person “‘has no standing for that purpose unless he belongs to the class which is prejudiced by the statute.’” *In re Appeal of Martin*, 286 N.C. 66, 75, 209 S.E.2d 766, 773 (1974) (citation omitted); *State v. Veach*, 34 N.C. App. 700, 703-04, 239 S.E.2d 705, 708 (1977), *cert. denied*, 294 N.C. 445, 241 S.E.2d 846 (1978) (“‘He who seeks to raise the question as to the validity of a discriminatory statute has no standing for that purpose unless he belongs to the class which is discriminated against.’”); *Roberts v. Durham County Hosp. Corp.*, 56 N.C. App. 533, 538, 289 S.E.2d 875, 878, *motion to dismiss denied, disc. review allowed*, 306 N.C. 387, 294 S.E.2d 205 (1982), *aff’d*, 307 N.C. 465, 298 S.E.2d 384 (1983) (“It is fundamental that a person seeking to raise the question as to the validity of an allegedly discriminatory statute has no standing for that purpose unless he belongs to the class allegedly prejudiced by the statute.”). “One recognized exception to this rule allows an affected party to allege discrimination when no member of a class subject to the alleged discrimination is in a position to raise the constitutional question.” *In re Appeal of Martin*, *supra*.

In the present case, Barbour first alleges that N.C.G.S. § 105-275(32) discriminates against the class of individual residential property owners who own their property for private personal residences and are not exempt under the statute from taxation. Barbour is a member of this class, and the exemption of property under this statute affects him as a residential property owner subject to taxation. Thus, based on the previously cited law, Barbour has standing to challenge the statute on this basis.

Next, Barbour alleges that N.C.G.S. § 105-275(32) discriminates against the class of homes for the aged, sick, or infirm, which

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are non-religious and non-Masonic. Barbour is not a member of this classification. Further, taxpayers of this State who are members of this class are under no disability to challenge this statute as discriminating against them. Thus, based on the previously cited law, Barbour lacks standing to challenge the statute on the basis that it discriminates against non-religious, non-Masonic homes for the aged, sick, or infirm. See *In re Appeal of Moravian Home, Inc.*, 95 N.C. App. 324, 329, 382 S.E.2d 772, 775, *disc. review denied, appeal dismissed*, 325 N.C. 707, 388 S.E.2d 457 (1989). We will not, therefore, address this argument, and our decision today is in no way dispositive of this issue.

III.

[2] Barbour argues that N.C.G.S. § 105-275(32) discriminates against individual property owners who own their property for residential purposes in violation of the rule of uniformity in taxation established under N.C. Const. art. V, § 2.

“Article V, Section 2 of the Constitution of North Carolina provides, *inter alia*, that the General Assembly alone has the power to classify property for taxation and that *no class shall be taxed except by a uniform rule.*” *Appeal of Martin*, 286 N.C. at 75, 209 S.E.2d at 773 (emphasis in original); N.C. Const. art. V, § 2(2). This constitutional provision does not, however, “prohibit reasonable flexibility and variety appropriate to reasonable schemes of State taxation.” *Appeal of Martin, supra*.

“While the General Assembly may not establish a classification that is arbitrary or capricious, a classification is constitutional if founded upon a reasonable distinction or difference and bears a substantial relation to the object of the legislation.” *Id.* at 76, 209 S.E.2d at 773. Thus, “[i]t is only those classifications which are arbitrary or capricious which violate Article V, Section 2.” *In re Appeals of Certain Timber Companies*, 98 N.C. App. 412, 416, 391 S.E.2d 503, 505 (1990) (citation omitted).

In the present case, the two classes at issue are (1) individual property owners who own their property for residential purposes and are not exempt under N.C.G.S. § 105-275(32), and (2) homes for the aged, sick, or infirm that are exempt under N.C.G.S. § 105-275(32). Thus, the question presented is whether these classifications are founded upon a rational basis, so that the distinction between the two residential groups may be upheld by this Court.

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See Broadwell Realty Corp. v. Coble, 291 N.C. 608, 617, 231 S.E.2d 656, 662 (1977).

To determine whether this classification is arbitrary, it is necessary to examine the purpose for the distinction in the statute between these homes and non-exempt individual residential properties. *See Appeals of Certain Timber Companies*, 98 N.C. App. 412, 391 S.E.2d 503 (1990).

A review of the case law involving the tax-exempt status of homes for the aged, sick, or infirm and applicable statutes prior to the enactment of N.C. Gen. Stat. § 105-275(32) is instructive on this issue. N.C. Gen. Stat. §§ 105-278.6 and 105-278.7 create property tax-exemptions for charitable institutions. Under N.C. Gen. Stat. § 105-278.6 (1992):

(a) Real and personal property owned by:

. . .

(2) A home for the aged, sick, or infirm;

. . .

shall be exempted from taxation if: (i) As to real property, it is actually and exclusively occupied and used, and as to personal property, it is entirely and completely used, by the owner for charitable purposes; and (ii) the owner is not organized or operated for profit.

(b) A charitable purpose within the meaning of this section is one that has humane and philanthropic objectives; it is an activity that benefits humanity or a significant rather than limited segment of the community without expectation of pecuniary profit or reward. . . .

Further, under N.C. Gen. Stat. § 105-278.7 (1992):

(a) Buildings, the land they actually occupy, and additional adjacent land necessary for the convenient use of any such building shall be exempted from taxation if wholly owned by an agency listed in subsection (c), below, and if:

(1) Wholly and exclusively used by its owner for nonprofit educational, scientific, literary, or charitable purposes . . . or

(2) Occupied gratuitously by an agency listed in subsection (c), below, other than the owner, and wholly and exclu-

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sively used by the occupant for nonprofit educational, scientific, literary, or charitable purposes.

. . .

(c) The following agencies, when the other requirements of this section are met, may obtain property tax exemption under this section:

(1) A charitable association or institution,

. . . .

In 1980, this Court applied N.C. Gen. Stat. § 105-278.7 to affirm the decision of the Property Tax Commission in *In re Taxable Status of Property*, 45 N.C. App. 632, 263 S.E.2d 838, *disc. review denied*, 300 N.C. 374, 267 S.E.2d 684 (1980) to grant tax exempt status to a nursing home as a charitable institution. The nursing home at issue in that case, the W.R. Winslow Memorial Home, Inc., was operated mainly for the aged and infirm and was affiliated with the Seventh-Day Adventist Church.

The issue before this Court in *Taxable Status of Property* was whether the W.R. Winslow Memorial Home, Inc. was a "charitable institution" and whether it used the property in question for a "charitable purpose" as required by N.C. Gen. Stat. § 105-278.7. This Court quoted favorably from *Central Bd. on Care of Jewish Aged, Inc. v. Henson*, 120 Ga. App. 627, 630, 171 S.E.2d 747, 750 (1969) in which the Georgia Court of Appeals stated,

" . . . [t]he concept of charity is not confined to the relief of the needy and destitute, for "aged people require care and attention apart from financial assistance, and the supply of this care and attention is as much a charitable and benevolent purpose as the relief of their financial wants."'"

Subsequently, this Court affirmed the Commission's finding that the W.R. Winslow Memorial Home, Inc. qualified for an exemption under N.C. Gen. Stat. § 105-278.7.

On the other hand, in 1983, this Court applied N.C. Gen. Stat. §§ 105-278.6 and 105-278.7 to affirm the Commission's decision to deny tax-exempt status for a home for the elderly in *In re Appeal of Chapel Hill Residential Retirement Center, Inc.*, 60 N.C. App. 294, 299 S.E.2d 782, *disc. review denied*, 308 N.C. 386, 302 S.E.2d 249 (1983). The home at issue in *Appeal of Chapel Hill Residential*

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Retirement Center, Inc., which was referred to as the Center, was a non-profit corporation that operated a complex which amounted to a "self-contained community" designed for elderly residents. "The Center consist[ed] of 230 apartments, a 60 bed health center, service facilities, a dining hall, a social hall, a gift shop, lounge areas and recreational facilities." *Id.* at 295, 299 S.E.2d at 783. Further, the Center did not rely on outside funding in order to operate.

In affirming the Commission's decision not to grant the Center tax-exempt status as a charitable institution, this Court stated,

[t]he Center is more in the nature of a cooperative operated for the mutual benefit of its residents who collectively pay for their care; it is not an institution providing for the special needs of individuals who are in need of charity, the aid of whom benefits society as a whole in addition to the residents.

Id. at 304, 299 S.E.2d at 788.

Similarly in 1984, in *In re Appeals of Barham*, 70 N.C. App. 236, 319 S.E.2d 657, *disc. review denied*, 312 N.C. 622, 323 S.E.2d 921 (1984), this Court again affirmed the decision of the Property Tax Commission to deny tax-exempt status to another home for the elderly as a charitable institution. In *Appeals of Barham*, respondent in the present case, LRM, applied for tax-exempt status under N.C. Gen. Stat. § 105-278.6 for its home for the elderly. In determining whether LRM qualified as a charitable institution, this Court stated:

In order to qualify for an exemption from *ad valorem* taxes, property must be used for a humane and philanthropic purpose and it must be used to benefit a significant segment of the community. LRM argues that it meets the qualifications because [its home] would provide for the basic social needs of its residents for love, safety and a sense of belonging. LRM further argues that a significant portion of the elderly in the Alamance County area would be able to afford these services.

We cannot agree with LRM's contentions. As we stated in *In re Chapel Hill Residential Retirement Center, supra*: "merely supplying care and attention to elderly persons cannot, alone constitute charity."

Id. at 243, 319 S.E.2d at 661. After discussing the fact that funds for operation of the home came mainly from the residents and

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that LRM screened their residents, this Court affirmed the Commission's decision that LRM was not a charitable institution within the meaning of N.C. Gen. Stat. § 105-278.6.

In response to this line of cases, in 1987, the North Carolina General Assembly introduced House Bill 318 entitled, "AN ACT TO CLARIFY THE EXEMPTION OF CERTAIN HOMES FOR THE AGED, SICK, OR INFIRM FROM PROPERTY TAXATION" to amend N.C. Gen. Stat. § 105-278.6. Subsequently this bill was renamed "AN ACT TO CLASSIFY PROPERTY OWNED BY CERTAIN NON PROFIT HOMES FOR THE AGED, SICK OR INFIRM AND EXCLUDE THIS PROPERTY FROM TAXATION", and on 12 June 1987 this bill was ratified and codified as N.C. Gen. Stat. § 105-275(32), the statute at issue in the present case.

N.C. Gen. Stat. § 105-275(32) defines "home for the aged, sick, or infirm" as a self-contained community designed for elderly residents that operates a skilled nursing facility, an intermediate care facility, or a home for the aged and includes residential dwelling units, recreational facilities, and service facilities. Further, the charter of the home has to provide that "in the event of dissolution, its assets will revert or be conveyed to an entity organized exclusively for charitable, educational, scientific, or religious purposes, and which qualifies as an exempt organization under Section 501(c)(3)" of the 1986 Internal Revenue Code. N.C. Gen. Stat. § 105-275(32). The home must also be owned, operated, and managed by one of the nonprofit, religious or Masonic groups listed in the statute.

The classification of homes for the aged, sick, or infirm is neither arbitrary nor capricious. Rather, after homes set up as communities to care for the elderly or infirm lost their status as tax-exempt charitable institutions, the Legislature sought to enact a statute that would grant these communities a tax-exemption aside from the charitable tax-exemption. The definition of "home for the aged, sick, or infirm" under N.C. Gen. Stat. § 105-275(32) reflects this intent and is narrowly tailored to promote communities for the elderly without giving a tax windfall to all residential property owners. *See Appeals of Certain Timber Companies*, 98 N.C. App. 412, 391 S.E.2d 503 (1990).

Thus, the distinction between "homes for the aged, sick, or infirm" and individuals who are residential property owners in N.C. Gen. Stat. § 105-275(32) does not violate N.C. Const. art. V, § 2. *See id.* (in order to prove a statute is unconstitutional under

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N.C. Const. art. V, § 2, petitioner must show that the distinction drawn between two classes as a basis for different tax treatment is either arbitrary or capricious).

IV.

[3] Next, Barbour argues that N.C. Gen. Stat. § 105-275(32) violates the equal protection clause of N.C. Const. art. I, § 19 by discriminating against individual residential property owners. We disagree.

A two-tiered analysis is employed by courts when addressing an equal protection claim. *Appeals of Certain Timber Companies*, 98 N.C. App. at 419, 391 S.E.2d at 507. The highest level of "strict scrutiny" applies "'only when the classification impermissibly interferes with the exercise of a fundamental right or operates to the peculiar disadvantage of a suspect class.'" *Id.* The lower level of scrutiny applies when no fundamental right or suspect class is involved. *Id.* at 420, 391 S.E.2d at 507. Individual residential property owners are not a suspect class, and a fundamental right is not involved; the lower level of scrutiny, therefore, applies in the present case.

" 'A statutory classification survives [the lower level of scrutiny] analysis if it bears "some rational relationship to a conceivable legitimate interest of government." . . . ' " *Id.* (citation omitted). Further, statutes which are subjected to the lower level of scrutiny "'come before the Court with a presumption of validity'", and "the party challenging the legislation has a tremendous burden in showing that the questioned legislation is unconstitutional." *Id.* at 420, 391 S.E.2d at 507-08 (citation omitted).

In the present case, Barbour has failed to demonstrate that the statute is unconstitutional because he has failed to "'negative every conceivable basis' that could exist to support this legislation." *Id.* at 421, 391 S.E.2d at 508. As already explained, the General Assembly intended to promote residential communities for the elderly which did not qualify for tax-exemptions under prior statutes by classifying certain of these homes as tax-exempt under N.C.G.S. § 105-275(32). Under the statute's definition of "home for the aged, sick, or infirm" set out previously, the exempt homes must provide residential and health facilities for the elderly.

Promoting the safety and welfare of the aged or infirm is a legitimate state objective. *See Tripp v. Flaherty*, 27 N.C. App. 180, 185, 218 S.E.2d 709, 712 (1975). Further, the exemption from

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taxation of these certain homes and the property used to run them has some rational relationship to this legitimate state interest. Thus, the distinction between “homes for the aged, sick, or infirm” and individual residential property owners under N.C. Gen. Stat. § 105-275(32) is not unconstitutional under N.C. Const. art. I, § 19.

Affirmed.

Judge JOHNSON concurs.

Judge MCCRODDEN concurs in the result.

JANET PATRICIA BAILEY AND CHARLES BAILEY v. J. KEMPTON JONES,
VILLAGE FAMILY PRACTICE, KAJA HEATER AND CHAPEL HILL
RADIOLOGY, P.A.

No. 9215SC893

(Filed 2 November 1993)

**Physicians, Surgeons, and Other Health Care Professionals § 149
(NC14th)— malpractice—failure to use best judgment—no
testimony—instruction not required—failure to use due
diligence—testimony offered—instructions in language of
statute insufficient**

In an action to recover for defendant’s alleged medical malpractice, the trial court properly refused to instruct the jury as to defendant’s duty to exercise his best judgment in the treatment of plaintiff, since there was no testimony, expert or lay, which tended to show that defendant breached such duty; however, plaintiff did offer expert testimony on the question of whether defendant exercised reasonable care and diligence in his treatment of plaintiff, and the court’s instructions addressing this issue which used only the precise language of N.C.G.S. § 90-21.12 were insufficient and require a new trial.

**Am Jur 2d, Physicians, Surgeons, and Other Healers
§ 363 et seq.**

Judge LEWIS concurring in the result.

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[112 N.C. App. 380 (1993)]

Appeal by plaintiff from judgment entered 16 April 1992 in Orange County Superior Court by Judge F. Gordon Battle. Heard in the Court of Appeals 1 September 1993.

Law Offices of Grover C. McCain, Jr., by Grover C. McCain, Jr., Kenneth B. Oettinger, and William R. Hamilton, for plaintiff-appellant Janet Patricia Bailey.

Patterson, Dilthey, Clay & Bryson, by E. C. Bryson, Jr. and Mark E. Anderson, for defendant-appellees J. Kempton Jones and Village Family Practice, P.A.

GREENE, Judge.

Janet Patricia Bailey (plaintiff) appeals from a jury verdict entered for defendants, Dr. J. Kempton Jones (Dr. Jones) and Village Family Practice, in plaintiff's medical malpractice action.

The evidence presented at trial tended to show the following facts. In May of 1988, plaintiff discovered a mass in her left breast during a routine breast self-examination. On 13 May 1988, plaintiff went to Village Family Practice, a partnership, for a physical examination and was examined by Dr. Jones, one of the partners. During the examination, plaintiff told Dr. Jones of the mass she had discovered and Dr. Jones attempted to locate the mass, but could not feel it. Dr. Jones told plaintiff that she must be feeling part of her breastbone. Dr. Jones, however, referred plaintiff to Chapel Hill Radiology, P.A., for a mammogram. A member of Dr. Jones' office called Chapel Hill Radiology on 13 May 1988 and scheduled an appointment for plaintiff on either 6 June or 16 June. Dr. Kaja Heater (Dr. Heater), a radiologist with Chapel Hill Radiology, testified that if a woman had a palpable mass, Chapel Hill Radiology would perform a mammogram on the same day the woman was examined by the referring physician. Dr. Jones gave plaintiff a "referral slip" which plaintiff was to take with her when she went to Chapel Hill Radiology for her mammogram.

Plaintiff contends that Dr. Jones did not properly fill out the "referral slip," failing to note that plaintiff had felt a mass in her breast. Dr. Jones testified that it is his custom to fill out the slip in its entirety.

Plaintiff was examined by Dr. Jones on 13 May 1988, and had the mammogram performed on 16 June 1988. The appointment book of Chapel Hill Radiology recorded that a 6 June appointment

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for the mammogram was cancelled. Plaintiff testified that the mammogram was originally scheduled for 16 June and that she did not cancel a 6 June appointment.

On 16 June 1988, plaintiff went to Chapel Hill Radiology for her mammogram. Plaintiff presented the "referral slip" to an employee of Chapel Hill Radiology and awaited her mammogram. At some point, it appears the "referral slip" was rewritten by an employee of Chapel Hill Radiology. It is unclear what became of the "referral slip" filled out by Dr. Jones.

Neither the technician who performed the mammogram, nor Dr. Heater, who interpreted the mammogram, saw the "referral slip" written by Dr. Jones, and neither was aware that plaintiff had felt a mass in her breast. After the mammogram, plaintiff talked with Dr. Heater about the results. Dr. Heater told plaintiff that although there was no previous mammogram for comparison, everything looked "fine."

The report sent from Chapel Hill Radiology to Dr. Jones noted that the mammogram revealed a mild tissue asymmetry in the left breast. Dr. Heater's report stated that "[i]f a palpable lesion is present, decision to biopsy should be based on clinical criteria." Dr. Heater further recommended a follow-up mammogram in six months.

Upon his receipt of Dr. Heater's report, Dr. Jones called plaintiff and told her that everything looked fine, but that he would like her to come back in six months for another mammogram. At trial Dr. Jones admitted that he did not fully understand Dr. Heater's report and that he believed that the language "[i]f a palpable lesion is present" meant that if he felt a lesion, a biopsy should be performed. Although Dr. Jones asked plaintiff to return in six months, no follow-up appointment was scheduled, nor did Dr. Jones' office send plaintiff a reminder.

Plaintiff next returned to see Dr. Jones on 16 August 1989. On this occasion, Dr. Jones noticed a mass in plaintiff's breast. Dr. Jones again referred plaintiff to Chapel Hill Radiology, where a mammogram revealed a lesion in the left breast. Dr. Jones then referred plaintiff to a surgeon who performed a biopsy of the left breast and diagnosed plaintiff as having cancer. Plaintiff underwent a radial mastectomy, as well as radiation and chemotherapy treatments. At the time of trial, plaintiff was clinically disease-free of cancer.

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Plaintiff and her husband, Charles R. Bailey, filed suit on 25 May 1990 in Orange County Superior Court, alleging that Dr. Jones, Village Family Practice, Chapel Hill Radiology, and Dr. Kaja Heater failed to timely diagnose her cancer, resulting in a delay in treatment. Plaintiff sought money damages for her reduced life expectancy and plaintiff's husband sought money damages for loss of consortium.

Plaintiff introduced the testimony of Dr. Lynn Carmichael (Dr. Carmichael), a family practitioner familiar with the standards of practice of family practitioners in Orange County at the time Dr. Jones treated plaintiff. Dr. Carmichael testified that the mammogram performed on plaintiff was a "screening mammogram" rather than a "diagnostic mammogram." The difference, according to Dr. Carmichael, is that a screening mammogram is primarily a preventive measure performed on a woman where there are no symptoms or findings of a lump or mass. A diagnostic mammogram, on the other hand, is performed when a lump or mass has been felt or when there is another reason, such as a patient's family medical history, which suggests that the patient may be at risk for breast cancer. Dr. Carmichael testified that in cases such as this, where a patient has told the doctor that she has felt a mass in her breast, "the doctor would probably want to order—to do a mammogram. That would be a diagnostic mammogram." Dr. Carmichael further testified: "Usually, if you're referring for a screening mammogram, there is not a great deal of urgency, and so it may take a few weeks to set it up, or a time that's convenient for the patient to go. For the diagnostic mammogram, though, you want results, and you would like to have them quickly."

Dr. Carmichael also testified that Dr. Jones should have called the radiologist after receiving the mammography report to clear up ambiguities contained in the report. Dr. Carmichael testified as follows:

[A]s I read the report, and what I considered an abnormality was noted, the density deep in the left breast. And while it—there was a notation that there were none of the microcalcifications that are characteristic of malignancy, there was still an abnormality that I didn't understand.

My lack of understanding there was compounded by the recommendation. The recommendation was to repeat the mammogram in six months.

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In doing the mammogram, your main concern—it's not the total concern, but the main concern is malignancy. Malignancies differ from other kinds of illnesses like respiratory infections or diabetes or arthritis in that you may in the course of the illness before the person maybe has many symptoms reach sort of a point of no return.

And I just feel that, while you might with a person who has diabetes, whose blood sugar was a little above normal say, "Well, let's just see what happens here, see if you develop any symptoms, and come in for a yearly physical, and if something happens in the meantime let me know."

You can do that with diabetes. You can't do that with malignancies, because you never know when these things are going to metastasize. So I felt that six months was outside the limit for a prudent recommendation for repeating the mammogram.

So when I'm faced with, again—please understand me. I'm not saying that—I'm saying that my interpretation was ambiguous. I don't think the radiologist meant to be ambiguous. I think, therefore, what I should have done as the physician would have been to call the radiologist and to discuss it with her and clarify her situation on it.

During the trial, plaintiff and her husband reached a settlement with Chapel Hill Radiology and Dr. Heater. At the close of plaintiff's evidence a directed verdict was entered for the remaining defendants on plaintiff's husband's loss of consortium claim.

The trial court instructed the jury in pertinent part as follows:

The defendant, Dr. Jones, would be negligent if he failed to provide care in accordance with the standard of health care required by law.

. . . . [T]he law requires a family practice physician to possess the degree of professional learning, skill, and ability that is ordinarily possessed by others in the same health care profession with similar training and experience who were situated in the same or similar communities at the time the health care services were rendered.

In order for you to find that Dr. Jones failed to act in conformity with the standard of health care required by law,

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plaintiff must satisfy you by the greater weight of the evidence what the standards of practice were among family practice physicians with similar training and experience, and who were situated in the same or similar communities at the time Dr. Jones examined the plaintiff in 1988, and that the defendant, Dr. Jones, did not act in accordance with those standards of practice in regards to what he did and did not do after receiving the mammogram report from the radiologist on June 16, 1988.

. . . .

So finally, members of the jury, as to this issue on which the plaintiff has the burden of proof, if you are satisfied by the greater weight of the evidence that the defendant, Dr. Jones, was negligent in that he failed to comply with the standard of health care required by law, and that such negligence was a proximate cause of injury to Mrs. Bailey, then it would be your duty to answer this issue "yes" in favor of the plaintiff.

The trial court refused, over plaintiff's objection, to instruct that Dr. Jones had breached his duty to (1) exercise his best medical judgment; and (2) use reasonable care and diligence in the treatment of plaintiff.

The jury returned a verdict for Dr. Jones and Village Family Practice and judgment was entered upon the verdict on 16 April 1992.

The issue presented is whether the trial court erred in refusing to instruct the jury as to Dr. Jones' duty to exercise best judgment and to use reasonable care and diligence in the treatment of plaintiff.

Under the common law of North Carolina, a physician must (1) possess the degree of professional learning, skill, and ability which others similarly situated ordinarily possess; (2) exercise reasonable care and diligence in the application of his knowledge and skill to the patient's case; and (3) use his best judgment in the treatment and care of the patient. *Hunt v. Bradshaw*, 242 N.C. 517, 521-22, 88 S.E.2d 762, 765 (1955). N.C. Gen. Stat. § 90-21.12, enacted in 1975, provides:

In any action for damages for personal injury or death arising out of the furnishing or the failure to furnish professional services in the performance of medical, dental, or other health care, the defendant shall not be liable for the payment

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of damages unless the trier of the facts is satisfied by the greater weight of the evidence that the care of such health care provider was not in accordance with the standards of practice among members of the same health care profession with similar training and experience situated in the same or similar communities at the time of the alleged act giving rise to the cause of action.

N.C.G.S. § 90-21.12 (1990). This statute did not create a new standard of care for medical malpractice nor is it "an exclusive statement of malpractice liability law." Robert G. Byrd, *The North Carolina Medical Malpractice Statute*, 62 N.C. L. Rev. 711, 741 (1984) [hereinafter *Byrd*]. The statute merely codifies the "'same or similar communities' standard of care previously adopted by this Court," *Wall v. Stout*, 310 N.C. 184, 191, 311 S.E.2d 571, 576 (1984); see *Makas v. Hillhaven, Inc.*, 589 F. Supp. 736, 740 (M.D.N.C. 1984) (the statute "refines the definition of same or similar communities"), and is meaningful only in terms of the common law duties. *Byrd* at 741. The enactment of N.C. Gen. Stat. § 90-21.12, therefore, did not abrogate the common law duties set forth in *Hunt, Wall*, 310 N.C. at 192, 311 S.E.2d at 576, but provided a basis by which compliance with these duties could be determined. Thus, the physician is required to (1) possess the degree of professional learning, skill, and ability possessed by others with similar training and experience situated in the same or similar communities at the time of the alleged negligent act; (2) exercise reasonable care and diligence, in accordance with the standards of practice among members of the same health care profession with similar training and experience situated in the same or similar communities at the time of the alleged negligent act, in the application of his knowledge and skill to the patient's case; and (3) use his best judgment in the treatment and care of his patient. Failure to comply with any one of these duties is negligence. *Hunt*, 242 N.C. at 521-22, 88 S.E.2d at 765.

Plaintiff makes no contention that defendant did not possess the necessary degree of professional learning, skill, and ability. Plaintiff does contend that defendant was negligent in failing to exercise his best judgment and in failing to exercise reasonable care and diligence in his treatment of her and that the trial court therefore erred in not instructing the jury on these duties. Because plaintiff timely objected to the instructions given, she was entitled to an instruction on these duties, if there was evidence in the record to support a breach of the duties. See *Penley v. Penley*,

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314 N.C. 1, 26-27, 332 S.E.2d 51, 66 (1985) (defendant barred from assigning error to jury instruction which was unsupported by the evidence where defendant failed to object); *see also Shields, Inc. v. Metric Constructors, Inc.*, 106 N.C. App. 365, 370, 416 S.E.2d 597, 600 (1992) (trial court must instruct on substantive features of the case).

Generally, expert testimony is necessary

to establish a prima facie case for malpractice against a physician or a hospital. Expert testimony is [also] typically required to establish the degree of care and skill required, any departure from that standard, and the causal relationship between the departure from the standard and the harm incurred by the plaintiff.

3 Charles Kramer, *Medical Malpractice* ¶ 29.01[1] (1990). North Carolina is in accord. *See Beaver v. Hancock*, 72 N.C. App. 306, 311, 324 S.E.2d 294, 298 (1985). Expert testimony is not required however, to establish the standard of care, failure to comply with the standard of care, or proximate cause, in situations where a jury, based on its common knowledge and experience, is able to decide those issues. *Powell v. Schull*, 58 N.C. App. 68, 71-72, 293 S.E.2d 259, 261, *disc. rev. denied*, 306 N.C. 743, 295 S.E.2d 479 (1982). The application of this "common knowledge" exception to the requirement of expert testimony in medical malpractice cases has been reserved for those situations in which a physician's conduct is so grossly negligent or the treatment is of such a nature that the common knowledge of laypersons is sufficient to find the standard of care required, a departure therefrom, or proximate causation. *See Buckner v. Wheeldon*, 225 N.C. 62, 64, 33 S.E.2d 480, 482 (1945) (plaintiff had compound fracture of leg with bone protruding through open wound, doctor failed to cleanse or sterilize open wound before setting leg in cast, causing infection); *Groce v. Myers*, 224 N.C. 165, 170, 29 S.E.2d 553, 557 (1944) (doctor, in the course of treating plaintiff's insanity, jerked plaintiff's arm, breaking it); *Mitchell v. Saunders*, 219 N.C. 178, 184, 13 S.E.2d 242, 246 (1941) (doctor left sponge in patient's body during surgery).

In this case there was no testimony, expert or lay, which tended to show that Dr. Jones breached the duty to exercise his best judgment. Accordingly, the trial court properly refused to instruct on this duty.

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As to whether Dr. Jones exercised reasonable care and diligence in his diagnosis and treatment of the plaintiff for breast cancer, expert testimony was required. This is a matter involving "highly specialized knowledge with respect to which a layman can have no reliable information." See *Jackson v. Mountain Sanitarium*, 234 N.C. 222, 227, 67 S.E.2d 57, 61 (1951). Plaintiff did offer expert testimony that Dr. Jones should have ordered that plaintiff undergo a diagnostic mammogram within a day of the 13 May examination and that Dr. Jones should have called the radiologist, after receiving the report, to clarify the ambiguities in the radiologist's report. This testimony goes to the question of whether Dr. Jones exercised reasonable care and diligence in his treatment of plaintiff and plaintiff was thus entitled to an instruction on this specific duty.

The instructions given in this case are insufficient. Our Supreme Court in specifically addressing this issue held that it was insufficient for the trial court to instruct the jury "that the sole issue relating to a physician's alleged negligence is whether he complied with [N.C.G.S. § 90-21.12]." *Wall*, 310 N.C. at 192, 311 S.E.2d at 576. In this instance the jury was instructed that Dr. Jones would be negligent if he "did not act in accordance with" "the standards of practice . . . among family practice physicians with similar training and experience, and who were situated in the same or similar communities at the time Dr. Jones examined the plaintiff in 1988." The use of only the precise language of N.C. Gen. Stat. § 90-21.12 was expressly prohibited by *Wall*, and therefore, the instruction was error requiring a new trial.

New trial.

Judge EAGLES concurs.

Judge LEWIS concurs in the result with separate opinion.

Judge LEWIS concurring in the result.

I agree with the majority that the trial court gave an incomplete instruction as to whether or not Dr. Jones complied with the appropriate standard of care. However, I disagree with the majority's analysis of whether or not expert testimony was required to show that Dr. Jones failed to exercise reasonable care and diligence in his treatment of plaintiff. The majority states that "expert testimony was required" and cites *Jackson v. Moun-*

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tain Sanitarium & Asheville Agr. Sch., 234 N.C. 222, 67 S.E.2d 57 (1951), because “[t]his is a matter involving ‘highly specialized knowledge with respect to which a layman can have no reliable information.’” The majority seems to cite *Jackson* for the proposition that expert testimony is always required on the issue of reasonable care and diligence and to that extent, I believe that the majority misconstrues *Jackson*.

The full sentence from which the majority quotes provides “[u]sually, what is the standard of care required of a physician or surgeon is one concerning highly specialized knowledge with respect to which a layman can have no reliable information.” *Id.* at 226-27, 67 S.E.2d at 61. This does not say that expert testimony is always required, only that it is usually required. In fact, in *Jackson* the Supreme Court went on to state that “[t]here are others, however, where non-expert jurors of ordinary intelligence may draw their own inferences from the facts and circumstances shown in evidence.” *Id.* at 227, 67 S.E.2d at 61-62. Actually, in the discussion which precedes the language which the majority quotes, the Supreme Court specifically disavowed the notion that expert testimony would always be required:

It is true it has been said that no verdict affirming malpractice can be rendered in any case without the support of medical opinion. If this doctrine is to be interpreted to mean that in no case can the failure of a physician or surgeon to exercise ordinary care in the treatment of his patient, or proximate cause, be established except by the testimony of expert witnesses, then it has been expressly rejected in this jurisdiction.

Id. at 226, 67 S.E.2d at 61. Thus it is clear that *Jackson* falls under the “common knowledge” exception to the requirement of expert testimony in medical malpractice cases. Although the majority accurately describes the “common knowledge” exception, I fear that future courts may seize upon the majority’s citation to *Jackson* as standing for the proposition that expert testimony is always required on the issue of reasonable care and diligence and for this reason I write separately.

STATE v. BROWN

[112 N.C. App. 390 (1993)]

STATE OF NORTH CAROLINA v. LEON BROWN

No. 9213SC1196

(Filed 2 November 1993)

1. Evidence and Witnesses § 1299 (NCI4th) — confession of mentally retarded defendant — waiver of Miranda rights — sufficiency of findings

The trial court's findings supported its conclusion that the fifteen-year-old mentally retarded defendant knowingly and intelligently waived his juvenile and *Miranda* rights prior to custodial interrogation where the court found: defendant suffers from mild mental retardation; as an S.B.I. agent read defendant his rights from a waiver of rights form, defendant indicated that he understood each of those rights by writing "Yes" or "Yes sir" beside each rights paragraph on the form; defendant never indicated that he did not understand any of his rights and gave reasonable and logical answers to a detective's questions; although defendant had difficulty understanding abstractions, he could understand information on a concrete level; and defendant had previously been involved in court proceedings and had a general understanding of the role of lawyers and police in a criminal justice system.

Am Jur 2d, Evidence §§ 573, 575.

2. Rape and Allied Offenses § 195 (NCI4th) — first-degree rape — instruction on attempted rape not required

The trial court in a first-degree rape prosecution did not err by refusing to instruct the jury on the lesser included offense of attempted rape where defendant's confession was the only evidence introduced at trial establishing his participation in the gang rape of the eleven-year-old victim, and defendant's statement clearly indicated penetration. A statement by another participant in the crime that defendant "wasn't doing it right" was insufficient to raise a reasonable doubt as to whether defendant actually penetrated the victim so as to require an instruction on attempted rape.

Am Jur 2d, Rape § 110.

Judge GREENE dissenting.

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[112 N.C. App. 390 (1993)]

Appeal by defendant from judgment entered 10 June 1992 by Judge E. Lynn Johnson in Bladen County Superior Court. Heard in the Court of Appeals 15 September 1993.

This case was previously tried and reversed on appeal. *State v. McCollum and Brown*, 321 N.C. 557, 364 S.E.2d 112 (1988). Defendant was convicted of first degree murder and first degree rape of an eleven-year old victim. Defendant was 15 years old at the time of the offense. The State's evidence tended to show that on Saturday night, 25 September 1983, defendant met his brother Buddy McCollum, and two of his friends in front of his house. They told defendant that they were going to rape the victim, and then kill her after they raped her. Defendant went along, and the four boys waited for the victim as she walked home from a neighborhood convenience store. They met her on the highway and took her into some nearby woods. There, each of them took turns raping the victim. After they finished, the other three boys discussed who was going to help kill her. Defendant refused to participate. The other three boys beat and kicked the victim. They then brutally took a stick and shoved her panties down her throat asphyxiating her.

The North Carolina Supreme Court reversed defendant's convictions and remanded for a new trial. On remand, defendant was convicted of first degree rape, G.S. 14-21.2, and sentenced to life imprisonment. In this appeal, defendant asserts as error the denial of his motion to suppress his confession, and the trial court's refusal to instruct the jury on the lesser included offense of attempted rape.

At the suppression hearing, the trial court entered the following order:

FINDINGS OF FACT

(1) That Special Agent Leroy Allen of the North Carolina State Bureau of Investigation was directed by his superior on Monday, September 26, 1983, to assist in the investigation of a homicide occurring in Red Springs, North Carolina.

(2) That on September 29, 1983, Special Agent Allen was instructed by his supervisor, Frank Johnson, to advise the defendant, Leon Brown, of his rights; that Special Agent Allen had had no prior contact with the defendant.

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(3) That Special Agent Allen entered a room at the Red Springs Police Department with Chief Haggins and Special Agent Ken Sneed; that the defendant was seated near a desk with his head hanging low; that Special Agent Allen introduced himself and advised the defendant that he was not under arrest; that the defendant was not frightened or upset and was not under the influence of alcohol nor drugs; that the defendant was quiet and did not ask for anyone; that the defendant in response to questions by Special Agent Allen furnished his name, age, sex, race, date of birth, parent, and number of years of school, all of which are reflected on State's Exhibit No. 1 for voir dire, a copy of which is attached to this order and incorporated herein by reference.

(4) That in respect to rights designated as Nos. 1, 2, 4, 5, 6, 8, and 9, the defendant responded, "Yes," in each separate case that he understood such rights; that in respect to rights designated No. 3 and No. 7, the defendant responded, "Yes, sir," indicating that he understood those rights, those rights being reflected on State's Exhibit No. 1 for voir dire; that the defendant acknowledged the understanding of the rights by printing his name in the space provided; that the defendant did not assert at any time that he did not understand any of the enumerated rights; that the defendant had no difficulty in providing the information reflected at the top of State's Exhibit No. 1 for voir dire; that the defendant has been previously involved in court proceedings prior to September, 1983, as a result of a previous charge for breaking and entering and larceny and was thus familiar with court proceedings by way of experience.

(5) That the defendant, Leon Brown, after being advised of the rights reflected on State's Exhibit No. 1 for voir dire, gave a statement to Detective Garth Locklear; that the defendant appeared to be nervous, but was sober; that the defendant did not ask for a parent or lawyer, although the defendant's mother was at the Red Springs Police Department during the interview process of Henry Lee McCollum and the defendant in the police department; that the defendant gave a lengthy and detailed statement concerning his participation with others in the alleged rape of [the victim] that the defendant gave reasonable and logical responses to the questions asked by Detective Locklear; that the defendant made corrections to

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the statement when read very slowly by Detective Locklear back to the defendant to acknowledge that he had limitations on his ability to read and write; that the defendant also reflected his movement and the movement of the others on a map drawn by Detective Locklear; that Detective Locklear was not aware of the details of a statement given by Henry Lee McCollum; that the defendant also made oral statements to Detective Locklear reflecting detailed participation in the alleged rape; that a copy of State's Exhibit No. 2 for voir dire and State's Exhibit No. 3 for voir dire are attached hereto and incorporated herein by reference.

(6) That the defendant has an I.Q. variously tested between 49 and 65, but has been generally classified as suffering from mild mental retardation; that the defendant's chronological age at the time of the interview was 15.

(7) That State's Exhibit No. 2 for voir dire consists of six handwritten pages and one supplemental page.

(8) That the defendant's maturity scale was measured at 12.6, giving the defendant a higher result than the intellectual assessment; that although the defendant has difficulty understanding abstractions, he is capable of understanding information on a concrete level; that the defendant has a general understanding of the role of lawyers and police in the criminal justice system.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Court enters the following conclusions of law:

(1) That the defendant knowingly, intelligently, and voluntarily waived each of the rights reflected on State's Exhibit No. 1 for voir dire and the waiver reflected thereon.

(2) That none of the defendant's rights under the North Carolina Constitution, U.S. Constitution, nor the North Carolina General Statutes have been violated.

(3) That the statement made by the defendant was not the product of any coercion, pressure, or intimidation.

(4) That the defendant's statement was voluntary in all respects.

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ORDER

Based upon the foregoing findings of fact and conclusions of law, the Court enters the following order:

(1) That the defendant's motion to suppress dated March 22, 1992, be and is hereby denied.

Attorney General Michael F. Easley, by Special Deputy Attorney General William N. Farrell, Jr., for the State.

Beskind, Rudolf and Maher, P.A., by Thomas K. Maher, for defendant-appellant.

EAGLES, Judge.

Defendant brings forward three assignments of error. We find no error and affirm.

[1] Defendant first contends that the trial court erred in finding that defendant knowingly, intelligently, and voluntarily waived his Miranda rights before making his confession at the police station. Prior to making his confession, defendant signed a "Juvenile Rights Warning" waiver form, which the trial court referred to in its order as "State's Exhibit No. 1 for voir dire." The following rights are listed on the form:

1. YOU HAVE THE RIGHT TO REMAIN SILENT.
2. ANYTHING YOU SAY CAN BE AND MAY BE USED AGAINST YOU.
3. YOU HAVE THE RIGHT TO HAVE A PARENT, GUARDIAN OR CUSTODIAN PRESENT DURING QUESTIONING.
4. YOU HAVE A RIGHT TO TALK WITH A LAWYER FOR ADVICE BEFORE QUESTIONING AND TO HAVE THAT LAWYER WITH YOU DURING QUESTIONING. IF YOU DO NOT HAVE A LAWYER AND WANT ONE, A LAWYER WILL BE APPOINTED FOR YOU.
5. IF YOU CONSENT TO ANSWER QUESTIONS NOW, WITHOUT A LAWYER, PARENT, OR GUARDIAN PRESENT, YOU STILL WILL HAVE THE RIGHT TO STOP ANSWERING AT ANY TIME.

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6. DO YOU UNDERSTAND EACH OF THESE RIGHTS I HAVE EXPLAINED TO YOU?

7. HAVING THESE RIGHTS IN MIND, DO YOU NOW WISH TO ANSWER QUESTIONS?

8. DO YOU NOW WISH TO ANSWER QUESTIONS WITHOUT A LAWYER PRESENT?

9. (FOR JUVENILES AGE 14 TO 16) DO YOU NOW WISH TO ANSWER QUESTIONS WITHOUT YOUR PARENTS, GUARDIANS, OR CUSTODIANS PRESENT?

The trial court found that defendant indicated that he understood each of his rights by writing "Yes" beside Nos. 1, 2, 4, 5, 6, 8, and 9, and "Yes sir" beside Nos. 3 and 7. The trial court also found that defendant acknowledged that he understood his rights by signing his name in the space provided at the bottom of the form.

Defendant does not dispute the trial court's findings of fact. Instead, defendant argues that those findings do not support the trial court's conclusion that defendant knowingly and intelligently waived his Miranda rights. Defendant contends that he suffers from mental retardation and that he did not fully understand his rights as they were read to him because the language in the waiver form was too complex for him to understand. Specifically, defendant refers to the language in rights No. 4 and 5:

4. YOU HAVE THE RIGHT TO TALK WITH A LAWYER FOR ADVICE BEFORE QUESTIONING AND TO HAVE A LAWYER WITH YOU DURING QUESTIONING. IF YOU DO NOT HAVE A LAWYER AND WANT ONE, A LAWYER WILL BE APPOINTED FOR YOU.

5. IF YOU CONSENT TO ANSWER QUESTIONS NOW, WITHOUT A LAWYER, PARENT, OR GUARDIAN PRESENT, YOU STILL WILL HAVE THE RIGHT TO STOP ANSWERING AT ANY TIME.

Defendant contends that he did not fully understand that he had the right to stop answering questions at any time, and that he could ask for a lawyer at any time during questioning. Defendant argues that since these rights were never explained to him in a way that he could understand them, his waiver was neither "knowing" nor "intelligent." Accordingly, defendant contends that his waiver was invalid. We disagree.

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A defendant may waive his Miranda rights, but the State bears the burden of proving that the defendant made a knowing and intelligent waiver. *State v. Simpson*, 314 N.C. 359, 334 S.E.2d 53 (1985); *Miranda v. Arizona*, 384 U.S. 436, 444, 16 L.Ed.2d 694, 707, *reh'g denied*, 385 U.S. 890, 17 L.Ed.2d 121 (1966). Whether a waiver is knowingly and intelligently made depends on the specific facts of each case, including the defendant's background, experience, and conduct. *Id.* at 367, 334 S.E.2d at 59; *Edwards v. Arizona*, 451 U.S. 477, 68 L.Ed.2d 378, *reh'g denied*, 452 U.S. 973, 69 L.Ed.2d 984 (1981). Although the trial court found that defendant was mildly retarded, "a subnormal mental condition standing alone will not render an otherwise voluntary confession inadmissible." *State v. Massey*, 316 N.C. 558, 575, 342 S.E.2d 811, 821 (1986) (quoting from *State v. Stokes*, 308 N.C. 634, 647, 304 S.E.2d 184, 192 (1983)). We look at the totality of the circumstances, and in the case of mentally retarded defendants, we pay particular attention to the defendant's personal characteristics and the details of the interrogation. *State v. Fincher*, 309 N.C. 1, 19, 305 S.E.2d 685, 697 (1983); *State v. Spence*, 36 N.C. App. 627, 629, 244 S.E.2d 442, 443, *disc. rev. denied*, 295 N.C. 56, 248 S.E.2d 734 (1978).

We note at the outset that the trial court's findings of fact are conclusive on appeal when they are supported by competent evidence in the record. *State v. Massey*, 316 N.C. 558, 575, 342 S.E.2d 811, 820 (1986). However, since defendant does not dispute the trial court's findings of fact, our task is to determine whether the trial court's legal conclusions are supported by its findings.

The trial court found that as Special Agent Allen read defendant his rights from the waiver form, defendant indicated that he understood each of those rights by writing "Yes" or "Yes sir" beside each rights paragraph on the form. Defendant never indicated to Special Agent Allen that he did not understand any of his rights, and he gave reasonable and logical answers to Detective Locklear's questions. The trial court found that although defendant had difficulty understanding abstractions, he could understand information on a concrete level. The trial court also found that defendant had previously been involved in court proceedings and that he had a general understanding of the role of lawyers and police in the criminal justice system. Prior experience with the criminal justice system is an important factor in determining whether the defendant made a knowing and intelligent waiver.

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State v. Fincher, 309 N.C. 1, 305 S.E.2d 665 (1983); see also *State v. Jackson*, 308 N.C. 549, 304 S.E.2d 134 (1983).

In *State v. Fincher*, 309 N.C. 1, 305 S.E.2d 665 (1983), the North Carolina Supreme Court held that the confession of a mentally retarded defendant was admissible despite expert testimony that he could not read and understand the waiver form. The court held that the trial court's findings of fact were sufficient to support its conclusion that the defendant made a valid waiver. In *Fincher*, the trial court found that each time the defendant was read his rights, "he unhesitatingly responded that he understood them." *Id.* at 20, 305 S.E.2d at 697. The *Fincher* court also found that the defendant's answers to the officer's questions were responsive and reasonable, and that no threats or inducements were made to the defendant. The *Fincher* trial court also found that the defendant had prior experience with the criminal justice system. Accordingly, we hold that under *Fincher*, the trial court's findings of fact adequately support its conclusion that defendant voluntarily, knowingly, and intelligently waived his Miranda rights.

[2] Defendant's third assignment of error is that the trial court erred in refusing to instruct the jury on the lesser included offense of attempted rape. A judge must instruct the jury upon a lesser included offense when there is evidence to support it. *State v. Wright*, 304 N.C. 349, 351, 283 S.E.2d 502, 503 (1981). However, "when the State's evidence is clear and positive with respect to each element of the offense charged, and there is no evidence showing the commission of a lesser included offense," the trial judge may refuse to instruct the jury upon that offense. *State v. Hardy*, 299 N.C. 445, 456, 263 S.E.2d 711, 718-19 (1980). Here, defendant was not entitled to an instruction on attempted rape. Instructions on the lesser included offenses of first degree rape are only required when there is some doubt or conflict concerning the element of penetration. *State v. Wright*, 304 N.C. 349, 351, 283 S.E.2d 502, 503 (1981). Defendant's confession was the only evidence introduced at trial establishing his participation in the gang rape of the eleven-year old victim. The relevant portions of defendant's confession state:

[Defendant] said, I then got on top of [the victim] while Darrell was holding her arms. . . .

That's when Darrell said, "Do it right, man. You ain't trying to do it. Do it like everybody else, man."

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[Defendant] said, That's when I began f[] her . . .

[Defendant] said, When I got off of her, Darrell said, "Get back on her and do it again. You ain't doing it right."

Defendant contends that his friend's statements that he "wasn't doing it right," raised a reasonable doubt as to whether he actually penetrated the victim. There is no indication in defendant's confession that he did not penetrate the victim. Any penetration, no matter how slight, of the female sex organ by the male sex organ is sufficient to prove the element of penetration. *State v. Brown*, 312 N.C. 237, 244, 321 S.E.2d 856, 861 (1984). Defendant's statement clearly indicates penetration. Nothing else appearing, another participant's opinion questioning whether defendant "was doing it right" is irrelevant. Accordingly, the trial court correctly refused to instruct the jury on attempted rape.

No error.

Judge ORR concurs.

Judge GREENE dissents.

Judge GREENE dissenting.

I agree with the majority that the trial court did not err in refusing to instruct the jury on the lesser included offense of attempted rape. I disagree, however, that the trial court's findings of fact are sufficient to support the conclusion that defendant knowingly, intelligently, and voluntarily waived his *Miranda* rights.

The State is "prohibited from using any statements resulting from a custodial interrogation of a defendant unless, prior to questioning, the defendant had been advised of his . . . [*Miranda* rights]." *State v. Simpson*, 314 N.C. 359, 367, 334 S.E.2d 53, 58-59 (1985). The defendant may "waive effectuation of these rights by a voluntary, knowing, and intelligent waiver." *Id.* at 367, 334 S.E.2d at 59. To be knowing and intelligent, the "waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." *Moran v. Burbine*, 475 U.S. 412, 421, 89 L. Ed. 2d 410, 421 (1986).

If the defendant is a person of "less than normal intelligence [and] does not have the capacity to understand the meaning and

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effect of his confession, and such lack of capacity is shown by evidence at the suppression hearing, it is error for the trial judge not to suppress the confession." *State v. Parsons*, 381 S.E.2d 246, 249 (W.Va. 1989); see 1 Wayne R. LaFave & Jerold H. Israel, *Criminal Procedure* § 6.9, at 526 (1984) ("unlikely" that waiver by "seriously mentally retarded" defendant will be found valid). If, however,

the defendant's lower than normal intelligence is not shown clearly to be such as would impair his capacity to understand the meaning and effect of his confession, said lower than normal intelligence is but one factor to be considered by the trial judge in weighing the totality of the circumstances surrounding the challenged confession.

Parsons, 381 S.E.2d at 249; see *State v. Fincher*, 309 N.C. 1, 8, 305 S.E.2d 685, 690 (1983) ("subnormal mental capacity is a factor to be considered"); 1 Wayne R. LaFave & Jerold H. Israel, *Criminal Procedure* § 6.9, at 526 (1984) ("low IQ can contribute to a finding of an ineffective waiver").

In this case the trial court found that defendant had an "I.Q. . . . between 49 and 65." The court also found that defendant responded to each *Miranda* warning by stating either "Yes" or "Yes, sir." The trial court made no finding that this mentally retarded fifteen-year-old defendant had the capacity to understand the *Miranda* warnings, only that defendant answered affirmatively that he "understood such rights." This express written waiver executed by the defendant "is not inevitably sufficient to establish a valid waiver." *Simpson*, 314 N.C. at 367, 334 S.E.2d at 59. The ultimate question remains whether defendant did "in fact" knowingly waive his *Miranda* rights. *North Carolina v. Butler*, 441 U.S. 369, 373, 60 L. Ed. 2d 286, 292 (1979); *Cooper v. Griffin*, 455 F.2d 1142, 1146 (5th Cir. 1972) (fact that "waiver obtained does not bar the courts from scrutinizing the circumstances of the confession"). Because there is no finding in this record that defendant did in fact knowingly and intelligently waive his *Miranda* rights, the motion to suppress should have been allowed. This is consistent with *Fincher*, relied on by the majority, in that in *Fincher* the trial court specifically found as a fact in concluding that defendant knowingly waived his rights, that the defendant did in fact "understand" his rights. I therefore would award the defendant a new trial.

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[112 N.C. App. 400 (1993)]

KIMBERLY H. HOOPER (WIDOW) AND REVEREND JERRY HOOPER (FATHER),
ADMINISTRATORS OF THE ESTATE OF TIMOTHY NELSON HOOPER, PLAINTIFFS
v. PIZZAGALLI CONSTRUCTION CO., ACME PLUMBING AND HEATING,
INC., WEST DURHAM MECHANICAL, INC. (FORMERLY COMFORT
ENGINEERS, INC.), DEFENDANTS

No. 9214SC126

(Filed 2 November 1993)

1. Labor and Employment §§ 184, 190 (NCI4th)— injury to subcontractor's employee—general contractor not liable

A general contractor could not be held liable for the death of a plumbing subcontractor's employee who fell from a scaffold on the ground that the general contractor breached a nondelegable duty of safety owed to the decedent since (1) the general contractor did not retain control of the manner and method by which the plumbing subcontractor performed its work; (2) the plumbing work performed was not an inherently dangerous activity; and (3) use of a scaffold to perform the plumbing work was not set out in the contract and was thus totally collateral to the work as contracted.

Am Jur 2d, Independent Contractors §§ 24, 30, 40.

2. Labor and Employment § 183 (NCI4th)— death of subcontractor's employee—fall from scaffold owned by another contractor—other contractor not liable

Defendant heating and air conditioning subcontractor was not liable for the death of a plumbing subcontractor's employee who fell from a scaffold on the ground that defendant breached a duty to the decedent as an invitee where there was evidence that the scaffold was owned by defendant but there was no evidence that permission had been given to decedent to use the scaffold, and there was no evidence that defendant placed the scaffold in the work area in which decedent fell or knowingly allowed its use by decedent.

Am Jur 2d, Independent Contractors §§ 24, 30, 40.

3. Judgments § 354 (NCI4th)— motion for relief from judgment— Rule 60(b) inapplicable to interlocutory judgments

The trial court properly denied plaintiffs' Rule 60(b) motion for relief from an order granting one defendant's motion to dismiss plaintiffs' complaint where the order resolved less

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than all claims in the action and was not a final judgment, since Rule 60(b) had no application to interlocutory judgments.

Am Jur 2d, Judgments § 1053.**4. Pleadings § 384 (NCI4th)— dismissal of complaint—denial of motion to set aside—amendment not permitted**

Since the trial court did not allow plaintiffs' motion to set aside an order dismissing plaintiffs' complaint, it could not allow plaintiffs' motion to amend their complaint.

Am Jur 2d, Pleadings § 289 et seq.**5. Labor and Employment § 190 (NCI4th)— injury to employee—Woodson claim against employer not shown—no jurisdiction in superior court**

Plaintiffs' forecast of evidence was insufficient to show that defendant plumbing subcontractor engaged in conduct substantially certain to cause death or injury so as to give the superior court jurisdiction under *Woodson v. Rowland* of a claim for the death of an employee who fell from a makeshift scaffold owned by another subcontractor where there was no evidence that the supervisor for defendant directed decedent to use the scaffold or expected that decedent's assigned work would be performed with the assistance of a makeshift scaffold.

Am Jur 2d, Independent Contractors § 40.

Appeal by plaintiffs from orders entered on 26 September 1991 and order entered 4 October 1991 by Judge Orlando F. Hudson in Durham County Superior Court. Heard in the Court of Appeals 6 January 1993.

Plaintiffs filed a complaint for the wrongful death of Timothy Hooper in Superior Court of Durham County on 3 July 1990 against defendants Pizzagalli Construction Co. (Pizzagalli), Acme Plumbing and Heating, Inc. (Acme), and Comfort Heating and Air Conditioning Company (Comfort). Acme filed a 12(b)(6) motion to dismiss on 16 August 1990. Defendants Pizzagalli and Comfort filed answers and crossclaims against Acme and against each other. The name of Comfort was changed to West Durham Mechanical, Inc. (West Durham). Amendments to the crossclaims were allowed and answers to crossclaims duly filed. On 15 January 1991, the court granted Acme's motion to dismiss plaintiffs' action, denied Acme's motion

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to dismiss the crossclaim of West Durham and denied Acme's motion to dismiss the crossclaim of Pizzagalli. Defendant Pizzagalli and defendant West Durham filed motions for summary judgment on 6 September 1991. Plaintiffs moved for relief from the order granting Acme's motion to dismiss pursuant to N.C.R. Civ. P. 60(b) and moved to amend the complaint. On 13 September 1991, plaintiffs served upon defendants counter affidavits, exhibits and depositions in opposition to defendants' motions for summary judgment. By an order dated 26 September 1991, the court granted defendant Pizzagalli's motion for summary judgment, granted defendant West Durham's motion for summary judgment, denied plaintiffs' motion for appropriate relief pursuant to N.C.R. Civ. P. 60(b) and denied plaintiffs' motion to amend. Plaintiffs filed timely notice of appeal.

Currin and Watson, P. A., by John W. Watson, Jr., for plaintiff-appellant.

M. Lynette Hartsell for plaintiff-appellant.

W. Phillip Moseley for plaintiff-appellant.

Newsom, Graham, Hedrick, Bryson & Kennon, by Joel M. Craig, for defendant-appellee Acme Plumbing & Heating, Inc.

Patterson, Dilthey, Clay, Cranfill, Sumner & Hartzog, by Robert W. Griffin and Kari Lynn Russwurm, for defendant-appellee Pizzagalli Construction Co.

Nye, Phears & Davis, by Charles B. Nye, C. Howard Nye, and William J. Wolf, for defendant-appellee West Durham Mechanical, Inc.

JOHNSON, Judge.

The facts pertinent to this appeal are as follows: Defendant Pizzagalli, as general contractor, executed a contract for the construction of Anylan Towers, with the owner of Duke University Medical Center. Defendant West Durham executed a subcontract agreement to provide heating, ventilation and air conditioning with the general contractor, and defendant Acme executed a subcontract agreement to provide plumbing with the general contractor.

On 6 July 1988, twenty-four year old Mr. Timothy Hooper and twenty-one year old Mr. Jimmy Rigsbee, employees of Acme, were sent to the seventh floor interstitial area on the project site

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to place a flange in a large valve. Unknown persons placed an unsecured scaffold board with the name "Comfort" painted on it across two I-beams leading to the duct installed by West Durham near the site of the valve. Mr. Hooper and Mr. Rigsbee performed their work thirteen feet above concrete, while standing on the scaffold board. Mr. Hooper and Mr. Rigsbee decided to work from the scaffold board in order to reach and tighten the bolts on the side of the valve opposite the uncompleted catwalk. There were no guardrails on the board and neither Mr. Hooper nor Mr. Rigsbee was secured.

Upon completion of the task, Mr. Rigsbee left the scaffold board and began to gather his tools on the solid concrete pad about twenty feet from the scaffold board. Mr. Hooper went back to the scaffold. Mr. Rigsbee looked up just as Mr. Hooper attempted to step off of the scaffold and onto the catwalk. At that time, the scaffold board began to slide and the board and Mr. Hooper began to fall. Mr. Hooper reached out and momentarily grabbed the metal toeboard of the catwalk. The toeboard bent and he rolled off, falling thirteen feet onto the concrete floor, landing on his back. Mr. Hooper was rushed to Duke Hospital where he was treated for severe head injury. He died on 8 July 1988.

The incident was reported to the Occupational Safety and Health Administration (OSHA) by Mr. Bob Carter, site superintendent for Acme. The scene of the fall was investigated by Mr. James Hall, a Safety Compliance Officer for OSHA, on 12 July 1988. At the conclusion of the investigation, Acme was cited for three non-serious and four serious violations of OSHA and fined \$540.00. On 3 July 1990, plaintiffs initiated this action for the wrongful death of the decedent.

[1] By plaintiffs' first assignment of error, plaintiffs contend that the trial court committed reversible error by granting defendant Pizzagalli's motion for summary judgment because plaintiffs' forecast of evidence through pleadings, affidavits and depositions established the duty of defendant Pizzagalli and the subsequent breach of that duty which was the proximate cause of decedent's death.

The Courts of North Carolina have long recognized that a general contractor is not liable for injuries sustained by a subcontractor's employees. *Woodson v. Rowland*, 329 N.C. 330, 407 S.E.2d 222 (1991). North Carolina law provides that a general contractor does not have a duty to furnish a subcontractor or the subcontractor

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tor's employees with a safe place in which to work. *Brown v. Texas Company*, 237 N.C. 738, 76 S.E.2d 45 (1953). Instead, it is the duty of the subcontractor to provide himself and his employees with a safe place to work and, also, to provide proper safeguards against the dangers of the work. *Id.*

However, North Carolina does recognize a few exceptions to the general rule of no liability. These exceptions are: (1) situations where the contractor retains control over the manner and method of the subcontractor's substantive work, (2) situations where the work is deemed to be inherently dangerous, and (3) situations involving negligent hiring and/or retention of the subcontractor by the general contractor. *Woodson*, 329 N.C. 330, 407 S.E.2d 222. In the case *sub judice*, plaintiffs can recover from Pizzagalli only if plaintiffs' forecast of evidence establishes that the circumstances surrounding the decedent's accidental death place plaintiffs' claim within one of the aforementioned exceptions.

Plaintiffs contend that this action falls within two of the three exceptions. Plaintiffs argue that defendant Pizzagalli maintained sufficient control over the manner and method of Acme's work, and had a nondelegable duty to insure the safety of the decedent because scaffolding was an inherently dangerous activity.

In considering this argument, we will address each exception and its applicability. Plaintiffs argue that defendant Pizzagalli retained sufficient control over the manner and method of defendant Acme's work, and as a result, defendant Pizzagalli should be held liable for its negligence. In *Woodson*, the North Carolina Supreme Court specifically stated that "one who employs an independent contractor is not liable for the independent contractor's negligence unless the employer retains the right to control the manner in which the contractor performs his work." *Woodson*, 329 N.C. at 350, 407 S.E.2d at 234.

In the instant case, the record establishes that defendant Pizzagalli did not retain the right to control the method and manner in which defendant Acme and its employees performed their job. The subcontract agreement between defendant Pizzagalli and defendant Acme reveals that defendant Acme was hired as a subcontractor to perform plumbing work. Pursuant to the contract, defendant Acme was to provide all labor, materials, tools, and equipment necessary to perform the work. While defendant Pizzagalli maintained a supervisory role and defendant Acme was expected

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to comply with the plans and specifications of the overall project, defendant Acme was free to perform its job according to its own independent skill, knowledge, training, and experience.

In *Denny v. City of Burlington*, 155 N.C. 33, 70 S.E. 1085 (1911), the Court stated:

The proprietor may make himself liable by retaining the right to direct and control the time and manner of executing the work or by interfering with the contractor and assuming control of the work, or of some part of it, so that the relation of master and servant arises, or so that an injury ensues which is traceable to his interference [...] . . . But merely taking steps to see that the contractor carries out his agreement, as, having the work supervised by an architect or superintendent, does not make the employer liable, nor does reserving the right to dismiss incompetent workmen.

Id. at 38, 70 S.E. at 1087. The record indicates that Pizzagalli had a general supervisory role, but did not interfere with Acme's work or any part of its work so as to retain control and thereby make itself liable. As such, this argument is meritless.

Plaintiffs also argue that the work being performed by the decedent in conjunction with the use of the scaffold was an inherently dangerous activity, and therefore, defendant Pizzagalli had a non-delegable duty to provide for the safety of others.

The law in North Carolina states that "[o]ne who employs an independent contractor to perform an inherently dangerous activity may not delegate to the independent contractor the duty to provide for the safety of others[.]" *Woodson*, 329 N.C. at 352, 407 S.E.2d at 235. An inherently dangerous activity is defined as work to be done from which mischievous consequences will arise unless preventative measures are adopted, *Greer v. Construction Co.*, 190 N.C. 632, 130 S.E. 739 (1925), and that which has "a recognizable and substantial danger inherent in the work, as distinguished from a danger collaterally created by the independent negligence of the contractor, which later might take place on a job itself involving no inherent danger." *Woodson*, 329 N.C. at 351, 407 S.E.2d at 234.

In the instant case, the record reveals that Acme was hired to perform plumbing work. At the time of the accident, the decedent was working on a valve located on the seventh floor interstitial

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area of the project. The record reveals that the decedent and his co-worker Rigsbee used a scaffold to better reach the valve. The decedent and Rigsbee stood on the scaffold thirteen feet off the ground and did not properly secure the scaffold board or take any other precautions. Use of a scaffold in conjunction with the plumbing work was not set out in the contract. As a result, use of the scaffold by the decedent and Rigsbee was totally collateral to the work as contracted. No recovery may be allowed for an injury resulting from an act or fault purely collateral to the work and which arises entirely from the wrongful act of the independent contractor or his employees. *Evans v. Elliott*, 220 N.C. 253, 259, 17 S.E.2d 125, 128 (1941); *Goolsby v. Kenney*, 545 S.W.2d 591, 594 (1976).

In addition, we find that the nature of plumbing work does not have any substantial and recognizable dangers inherent in the work. Although North Carolina has not directly addressed the issue of whether plumbing is an inherently dangerous activity, other jurisdictions have held that plumbing is not an inherently dangerous activity. *Goolsby*, 545 S.W.2d 591. Accordingly, we find the trial court was correct in granting defendant Pizzagalli's summary judgment motion on the issue of negligence in that (1) defendant Pizzagalli did not retain control of the manner and method in which defendant Acme performed its work, (2) the work performed was not an inherently dangerous activity, and (3) the death of the decedent resulted from the use of a scaffold which was totally collateral to the work as contracted relieving defendant Pizzagalli of liability.

[2] By plaintiffs' second assignment of error, plaintiffs contend that the trial court erred in granting defendant West Durham's summary judgment motion. We disagree.

Summary judgment is appropriate where there is no genuine issue of fact and the moving party is entitled to judgment as a matter of law. *Neal v. Craig Brown, Inc.*, 86 N.C. App. 157, 158, 356 S.E.2d 912, 913, *disc. review denied*, 320 N.C. 794, 361 S.E.2d 80 (1987). This is determined by a consideration of the pleadings, depositions, answers to interrogatories, admissions on file, affidavits and any other materials presented to the court. *Buffington v. Buffington*, 69 N.C. App. 483, 488, 317 S.E.2d 97, 100 (1984).

Plaintiffs argue that defendant West Durham was negligent in that defendant breached a duty owed to decedent as an invitee

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to use ordinary care. Plaintiffs cite *Cathey v. Construction Co.*, 218 N.C. 525, 11 S.E.2d 571 (1940) in support of their argument.

In *Cathey*, an employee of a subcontractor sustained an injury when he fell off a scaffold that had been constructed and was owned by the main contractor. The issue on appeal was whether the main contractor had a duty to exercise due care to plaintiff.

The facts of the case revealed a long course of dealing between the parties, and an agreement between the main contractor and the subcontractor that the necessary scaffold, to be used in the installation of the roof, would be furnished by the main contractor. The Court concluded that based on the aforementioned facts, the defendant owed a duty to the worker as an invitee and that the defendant had breached its duty when the defendant knowingly allowed the plaintiff to use a scaffold made of defective material and of insufficient strength, and removed a support without notice to the employees. The *Cathey* Court found sufficient facts to allow the case to be submitted to the jury on the issue of the defendant's negligence.

The facts in the instant case are distinguishable in that there was no evidence that permission had been given to the worker to use the scaffold. Moreover, defendant West Durham presented evidence that on the day of the accident defendant West Durham had two crews working on the project but neither crew was using the scaffold in the work area where the decedent fell. There was no evidence presented by plaintiff which showed who was responsible for placing the scaffold in the work area where the decedent fell.

Plaintiff has simply come forward with no evidence that West Durham placed the scaffold board in the work area in which decedent fell or knowingly allowed its use by the decedent. As such, we cannot find a duty owed or a duty breached. We find the trial court correctly granted a summary judgment motion as a matter of law on the issue of negligence.

[3] By plaintiffs' last assignment of error, plaintiffs contend the trial court erred when it denied plaintiffs' motion for appropriate relief and motion to amend, and when it granted defendant Acme's 12(b)(6) motion. We disagree.

An order granting or denying relief under North Carolina General Statutes § 1A-1, Rule 60(b) (1990) will not be disturbed on appeal unless it appears that there was a substantial miscar-

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riage of justice or that the decision is manifestly unsupported by reason. *Huggins v. Hallmark Enterprises, Inc.*, 84 N.C. App. 15, 351 S.E.2d 779 (1987).

Plaintiffs do not appeal from the original order dismissing plaintiffs' claims against Acme. Instead, plaintiffs appeal from Judge Hudson's ruling on plaintiffs' motion which requested appropriate relief from an order entered by Judge Read which granted defendant Acme's motion to dismiss plaintiffs' complaint.

The Rule 60 motion was appropriately denied in that the order entered by Judge Read resolved less than all claims in the action. The judgment therefore was not a final judgment and remained interlocutory until the other pending claims were resolved. Rule 60(b) has no application to interlocutory judgments or proceedings of the trial court. It only applies, by its express terms, to final judgments. *Sink v. Easter*, 288 N.C. 183, 217 S.E.2d 532 (1975). We find that Judge Hudson was therefore correct in denying the plaintiff's motion for appropriate relief.

[4] In addition, we find the trial court properly denied plaintiffs' motion to amend. As a general rule, when an order is entered dismissing a claim, amendment of the complaint is not allowed unless the order is set aside or vacated under Rule 59 or Rule 60. *Johnson v. Bollinger*, 86 N.C. App. 1, 356 S.E.2d 378 (1987). Since the court did not allow plaintiffs' motion to set aside the order dismissing plaintiffs' complaint, it could not allow plaintiffs' motion to amend plaintiffs' complaint. *Chrisalis Properties, Inc. v. Separate Quarters, Inc.*, 101 N.C. App. 81, 398 S.E.2d 628 (1990), *disc. review denied*, 328 N.C. 570, 403 S.E.2d 509 (1991).

[5] Plaintiffs also argue that the trial court erred in granting defendant Acme's motion to dismiss the complaint on the grounds that the court had no subject matter jurisdiction over plaintiffs' claim pursuant to the Workers' Compensation Act. Plaintiffs argue that they filed a tort action which alleged that defendant Acme engaged in misconduct which was substantially certain to cause death or injury and pursuant to the holding in *Woodson*, the trial court did have subject matter jurisdiction.

The Court in *Woodson* stated:

[W]hen an employer intentionally engages in misconduct knowing it is substantially certain to cause serious injury or death to employees and an employee is injured or killed by that

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misconduct, that employee, or the personal representative of the estate in case of death, may pursue a civil action against the employer. Such misconduct is tantamount to an intentional tort, and civil actions based thereon are not barred by the exclusivity provisions of the [Workers' Compensation] Act.

Woodson, 329 N.C. at 340-41, 407 S.E.2d at 228. Because the employer furnishes benefits under the Act, employer liability must be based on more egregious conduct than the "wilful and wanton misconduct" standard applicable to injuries inflicted by co-employees. *Id.*

The forecast of evidence by plaintiffs did not produce evidence tending to show that the employer defendant Acme engaged in conduct substantially certain to cause death or injury. As stated earlier, defendant Acme was hired to provide plumbing services for the project. There was no evidence that the supervisor for defendant Acme directed the decedent and Mr. Rigsbee to engage in any activity substantially certain to cause death or injury. In fact, there was no evidence presented which established that the supervisor directed decedent and Mr. Rigsbee to use the makeshift scaffold or expected that the installation of a valve gasket would be performed with the assistance of the makeshift scaffold. As such, there is no genuine issue of fact as to whether any agent of Acme engaged in misconduct which was known to create a substantial certainty of death or injury. Because *Woodson* is inapplicable, the action falls under the exclusivity provisions of the Workers' Compensation Act and the trial court is without subject matter jurisdiction. The trial court properly granted defendant Acme's motion to dismiss.

The decision of the trial court is affirmed.

Judges GREENE and WYNN concur.

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STATE OF NORTH CAROLINA v. JERRY GLENN BAKER, DEFENDANT

No. 928SC259

(Filed 2 November 1993)

1. Criminal Law § 106 (NCI4th)— witnesses' statements made available to defendant—procedure—defendant not prejudiced

Though the trial judge, in conducting an *in camera* review of witnesses' statements for the purpose of determining whether the portions of the statements relevant to the subject matter had already been provided to defendant, should have reviewed these statements immediately after direct examination so that defendant could have the statements for cross-examination, defendant was not prejudiced by the actions of the judge, since it appeared from the record that defendant had been provided all relevant statements of witnesses in compliance with N.C.G.S. § 15A-903.

Am Jur 2d, Depositions and Discovery § 428.

Right of defendant in criminal case to inspection of statement of prosecution's witness for purposes of cross-examination or impeachment. 7 ALR3d 181.

2. Conspiracy § 18 (NCI4th)— conspiracy not merged with substantive offense—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss a charge of conspiracy to possess cocaine on the ground the conspiracy charge merged into the trafficking by possession charge or on the ground of insufficiency of the evidence since a conspiracy charge, though it may merge into a continuing criminal enterprise charge, does not merge into the substantive offense of possession, and testimony of a coconspirator was sufficient to withstand defendant's motion to dismiss on the ground of insufficiency of evidence of conspiracy.

Am Jur 2d, Conspiracy §§ 5-9.**3. Narcotics, Controlled Substances, and Paraphernalia § 196 (NCI4th)— trafficking in cocaine—felony possession of cocaine—no instruction on lesser offense required**

In a prosecution of defendant for trafficking in cocaine by possession of more than 200 but less than 400 grams and

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conspiring to commit the felony of possession of at least 200 but less than 400 grams of cocaine where the tape of a conversation at defendant's home contained discussion of defendant's purchase of approximately 250 grams of cocaine, no instructions on lesser included offenses was proper.

Am Jur 2d, Drugs, Narcotics and Poisons § 47.5.**4. Evidence and Witnesses § 1623 (NCI4th)— tape recorded conversation— authentication**

A tape of defendant's conversation with his coconspirators was properly authenticated where the coconspirators both identified the tape and listened to it, testifying that the tape was a fair and accurate recollection of their conversation with defendant. N.C.G.S. § 8C-1, Rule 901.

Am Jur 2d, Evidence § 436.

Appeal by defendant from order entered 23 September 1991 by Judge James R. Strickland in Wayne County Superior Court. Heard in the Court of Appeals 30 March 1993.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Floyd M. Lewis, for the State.

Dees, Smith, Powell, Jarrett, Dees & Jones, by John W. Dees and Rose Vaughn Williams, for defendant-appellant.

JOHNSON, Judge.

Defendant Jerry Glenn Baker was indicted on 24 June 1991 in a two count bill of indictment on the charges of trafficking in cocaine by possessing at least 200 grams but less than 400 grams of cocaine and conspiring to commit the felony of possession of at least 200 grams but less than 400 grams of cocaine. A jury found defendant not guilty on the charge of trafficking in cocaine by possessing at least 200 grams but less than 400 grams of cocaine, and guilty on the charge of conspiring to commit the felony of possession of at least 200 grams but less than 400 grams of cocaine. Defendant filed notice of appeal to this Court.

Evidence presented by the State tended to show the following: Witnesses Harry Robert Gautier and Donald Ray Thompson had histories of dealing in illegal drugs; they formed a partnership in 1988 for the purpose of buying and selling cocaine, splitting

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the profits. Thompson began dealing in drugs with defendant in early 1989 when Thompson took defendant some half ounces¹ of cocaine, and defendant picked up half ounces of cocaine at Thompson's house. Gautier met defendant in the spring of 1989 at Thompson's house, where he told defendant that he and Thompson were partners in the cocaine business. During the course of this conversation, defendant told Gautier that he figured Gautier and Thompson were partners, and Thompson sold defendant a half ounce of cocaine. In June of 1989, Gautier delivered a half ounce of cocaine to defendant's house.

Gautier spoke with defendant in late 1989 and told defendant that he and Thompson were no longer dealing in small amounts of cocaine and that defendant should contact Hugh Earl Stroud if he wanted small amounts of cocaine.

Gautier saw defendant at the County Line Grocery sometime in early November 1989. At that time, Gautier told defendant that Gautier would sell defendant a quarter kilogram² of cocaine; although defendant did not have the total amount of the purchase (\$8,500.00) up front, Gautier offered to front the cocaine to defendant. Later in November or early December, Gautier delivered the quarter kilogram of cocaine to defendant's house. Defendant paid Gautier an initial \$2,000.00 for this cocaine at the time it was delivered, and over a period of several dates paid the balance due to Gautier. Thompson was not present when defendant made the deal to purchase this cocaine.

In early 1990, Gautier and Thompson were arrested and charged with various drug-related offenses. Gautier and Thompson testified that they agreed to provide substantial assistance to the State in return for special consideration for their assistance at their sentencing hearing. As part of this assistance, Thompson and Gautier went to visit with defendant on 30 May 1990, at which time Thompson wore a concealed tape recorder. While at defendant's home, Thompson, Gautier and defendant conversed concerning drug transactions, including the purchase of the quarter kilogram of cocaine which defendant made from Gautier and also concerning the possibility of defendant getting Thompson and Gautier some cocaine from Bill Moyers. Thompson and Gautier later delivered this tape to

1. A half ounce is approximately fourteen (14) grams.

2. A quarter kilogram is approximately 250 grams.

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Officer Jerry Best of the Wayne County Sheriff's Department, at which time Thompson and Gautier initialed and dated the tape.

At trial, Thompson and Gautier both identified the tape and listened to it, testifying that the tape was a fair and accurate recordation of the conversation they held with defendant. Bill Moyers also testified at trial for the State.

Officer Best testified the tape was the one used to record the conversation between the defendant, Thompson and Gautier. He further testified the tape had been in his exclusive care and custody from 30 May 1990 until the date of trial.

A *voir dire* hearing was held during which Steven G. Surratt from the North Carolina State Bureau of Investigation gave testimony concerning the authentication of a transcript of a tape. Surratt testified the transcript presented by the State of the taped conversation between the defendant, Thompson and Gautier was a fair and accurate rendition.

The tape was played for the jury and the jury was provided with copies of the transcript in order to follow the tape. The defendant did not introduce any evidence.

In response to defendant's pre-trial motions for discovery of his statements in possession of the State, defendant was given a one page statement of four paragraphs. Each paragraph was a separate statement by different persons (Thompson, Gautier, and two statements by Moyers) as to statements made by the defendant or involving the presence of the defendant. During jury selection, the State gave defendant excerpts from grand jury testimony given by these witnesses as to these statements. At trial, these witnesses testified to the contents of these statements as well as other statements.

A *voir dire* hearing was held at trial on defendant's request to determine whether there existed statements of defendant which had not already been provided to defendant and which should have been provided pursuant to North Carolina General Statutes § 15A-903(a)(2) (1988). The trial court found "as a matter of law . . . the District Attorney, in compliance with G. S. 15A-903(a)(2) of the North Carolina General Statutes has complied with the statute in divulging the substance of any oral statements relative to the subject matter of the case made by the defendant, regardless of to whom the statement is made." Later in the proceeding, the

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trial judge entertained a motion *in camera* by defendant for discovery of all of the statements of witnesses Gautier, Thompson and Moyers which were made to the Wayne County Grand Jury.

[1] Defendant first argues the trial court committed prejudicial error when it denied defendant's repeated discovery requests which were made at trial pursuant to North Carolina General Statutes § 15A-903 on the grounds that defendant, by the clear wording of the discovery statute, was entitled to the material requested.

North Carolina General Statutes § 15A-903 provides in pertinent part:

(a) Statement of Defendant.—Upon motion of a defendant, the court must order the prosecutor:

. . .

(2) To divulge, in written or recorded form, the substance of any oral statement relevant to the subject matter of the case made by the defendant, regardless of to whom the statement was made, within the possession, custody or control of the State, the existence of which is known to the prosecutor or becomes known to him prior to or during the course of trial[.]

. . .

(f) Statements of State's Witnesses.

. . .

(2) After a witness called by the State has testified on direct examination, the court shall, on motion of the defendant, order the State to produce any statement of the witness in the possession of the State that relates to the subject matter as to which the witness has testified. If the entire contents of that statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

(3) If the State claims that any statement ordered to be produced under this section contains matter that does not relate to the subject matter of the testimony of the witness, the court shall order the State to deliver that statement for the inspection of the court *in camera*. Upon delivery the court shall excise the portions of the statement that do not relate to the subject matter of the testimony of the witness. With

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that material excised, the court shall then direct delivery of the statement to the defendant for his use. If, pursuant to this procedure, any portion of the statement is withheld from the defendant and the defendant objects to the withholding, and if the trial results in the conviction of the defendant, the entire text of the statement shall be preserved by the State and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this subsection, the court, upon application of the defendant, may recess proceedings in the trial for a period of time that it determines is reasonably required for the examination of the statement by the defendant and his preparation for its use in the trial.

. . .

(5) The term "statement," as used in subdivision (2) [and]
(3) . . . in relation to any witness called by the State means

a. A written statement made by the witness and signed or otherwise adopted or approved by him;

b. A stenographic, mechanical, electrical or other recording, or a transcription thereof, that is a substantially verbatim recital or an oral statement made by the witness and recorded contemporaneously with the making of the oral statements.

In *State v. Brown*, 306 N.C. 165, 293 S.E.2d 569, *cert. denied*, 459 U.S. 1080, 74 L.Ed.2d 642 (1982), our Supreme Court made reference to *State v. Hardy*, 293 N.C. 105, 235 S.E.2d 828 (1977), in which the Court "established the rules for our trial courts to follow in instances where a specific request is made at trial for disclosure of evidence in the State's possession that is obviously relevant, competent and not privileged." *Brown*, 306 N.C. at 165-66, 293 S.E.2d at 579. The Court in *Brown* went on to note that Justice Copeland in *Hardy* stated "justice requires the judge to order an *in camera* inspection when a specific request is made at trial for disclosure of evidence in the State's possession that is obviously relevant, competent and not privileged. The relevancy for impeachment purposes of a prior statement of a material State's witness is obvious." *Id.* (Citations omitted.)

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We note, pursuant to North Carolina General Statutes § 15A-903(f)(2), the trial judge conducted an *in camera* review of the statements of these witnesses which were in the State's possession. The trial judge determined the portions of the statements relevant to the subject matter had already been provided to defendant. We find that in conducting the *in camera* review, the trial judge should have reviewed these statements of each witness immediately after direct examination. Had the judge found statements which should have been delivered to the defendant for his use, the defendant would have needed those statements for cross-examination. However, our Court, pursuant to North Carolina General Statutes § 15A-903(f)(2), has received the entire text of the statements of these witnesses for review on appeal. Although we find that one page of the grand jury testimony (specifically, grand jury testimony page number 2341) was not contained in the record on appeal as having been provided to defendant, we have reviewed the contents of that page as well as the entire record, and we find the defendant was not prejudiced by the actions of the trial judge.

[2] Defendant next argues the trial court erred when it denied defendant's motion to dismiss on the ground the conspiracy charge merged into the trafficking charge, and on the ground there was insufficient evidence presented by the State on both charges.

A conspiracy is an agreement between two or more persons to commit an unlawful act or to commit a lawful act in an unlawful way. *State v. Lowery*, 318 N.C. 54, 347 S.E.2d 729 (1986). It is well established that the crime of conspiracy does not merge into the substantive offense which results from the conspiracy's furtherance and that a defendant may be properly sentenced for both offenses. *State v. Small*, 301 N.C. 407, 272 S.E.2d 128 (1980). "To constitute a conspiracy it is not necessary that the parties should have come together and agreed in express terms to unite for a common object; rather, a mutual, implied understanding is sufficient, so far as the combination or conspiracy is concerned, to constitute the offense. The conspiracy is the crime and not its execution." *State v. Abernathy*, 295 N.C. 147, 164, 244 S.E.2d 373, 384 (1978). An overt act is not necessary to complete the crime of conspiracy; "[a]s soon as the union of wills for the unlawful purpose is perfected, the offense of conspiracy is complete." *Id.*

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Defendant argues that because the United States Supreme Court has ruled that a conspiracy charge merges into a continuing criminal enterprise charge, *see Jeffers v. U.S.*, 432 U.S. 137, 53 L.Ed.2d 168, *reh'g denied*, 434 U.S. 880, 54 L.Ed.2d 164 (1977), we should find that the conspiracy in this case has merged with the offense of possession. Defendant argues in *Jeffers*, the Court reasoned that the conspiracy statute and the continuing enterprise statute exist to punish group conduct, which is more dangerous to the public than an individual acting alone; defendant argues this reasoning should be applied herein. We do not find the crimes in this case analogous to those in *Jeffers*. We do note Chief Justice Exum in *State v. Small* wrote that merging the offense of conspiracy into the substantive offense would be proper "were a defendant convicted of the substantive offense solely on the basis of his participation in the conspiracy." *Small*, 301 N.C. at 428, 272 S.E.2d at 141. Again, this does not apply to the facts of this case. Therefore, we find this argument to be without merit.

Further, "[i]t is well-established that the testimony of a co-conspirator is competent to establish a conspiracy[.] . . . In considering a motion to dismiss, the trial court is concerned only with the sufficiency of the evidence, not with the weight of the evidence." *Lowery*, 318 N.C. at 71, 347 S.E.2d at 741 (citations omitted). We find the testimony of co-conspirator Gautier was sufficient to withstand defendant's motion to dismiss on the ground there was insufficient evidence of the charge of conspiracy presented by the State.

[3] Defendant next argues the trial court committed prejudicial error when it denied the defendant's request that the jury be instructed on lesser included offenses.

"The necessity for instructing the jury as to an included crime of lesser degree than that charged arises when and only when there is evidence from which the jury could find that such included crime of lesser degree was committed." *State v. Siler*, 66 N.C. App. 165, 166, 311 S.E.2d 23, 24, *aff'd as modified*, 310 N.C. 731, 314 S.E.2d 547 (1984). "When the State's evidence is positive as to each and every element of the crime charged and there is no conflicting evidence relating to any element, no instruction on a lesser included offense is required." *State v. Hall*, 305 N.C. 77, 84, 286 S.E.2d 552, 556 (1982); *see also State v. Drumgold*, 297 N.C. 267, 254 S.E.2d 531 (1979). Applying these rules to the facts herein, we note the tape of the conversation at defendant's home

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on 30 May 1990 contained discussion of the purchase of the quarter kilogram, approximately 250 grams, of cocaine which defendant made from Gautier; thus, no instruction on lesser included offenses was proper.

[4] Defendant next contends the trial court erred when it allowed the tape of alleged statements made by the defendant and a transcript of the tape into evidence on the grounds the tape was not properly authenticated, and was acquired by violation of the state and federal constitutional rights of the defendant.

The tape was authenticated pursuant to North Carolina General Statutes § 8C-1, Rule 901 (1992), which reads:

(a) *General provision.*—The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

(b) *Illustrations.*—By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:

. . .

(5) *Voice Identification.*—Identification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker.

Our Supreme Court has stated “[u]nder Rule 901, testimony as to accuracy based on personal knowledge is all that is required to authenticate a tape recording, and a recording so authenticated is admissible if it was legally obtained and contains otherwise competent evidence.” *State v. Stager*, 329 N.C. 278, 317, 406 S.E.2d 876, 898 (1991). The facts herein show that at trial, Thompson and Gautier both identified the tape and listened to it, testifying that the tape was a fair and accurate recordation of the conversation they held with defendant. This was sufficient to meet the State’s burden of authentication.

We choose not to address defendant’s constitutional argument, as this argument was not raised in the trial court.

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Finally, we note defendant's remaining argument, that the trial court erred as to the sentence which was imposed on defendant, is meritless. North Carolina General Statutes § 15A-1340.4(f) (Cum. Supp. 1992) clearly states the presumptive prison terms contained within apply "[u]nless otherwise specified by statute[.]" Therefore, the trial judge properly applied North Carolina General Statutes § 90-95(h)(3)(b) (Cum. Supp. 1992).

In the trial of defendant's case, we find no error.

No error.

Judges ORR and McCRODDEN concur.

STATE OF NORTH CAROLINA v. CHARLES WAYNE ALLEN, DEFENDANT

No. 926SC463

(Filed 2 November 1993)

1. Indigent Persons § 19 (NCI4th)— psychiatrist at State expense—denial—no error

Defendant failed to demonstrate the need for State funds to employ an independent psychologist and psychiatrist to assist in his defense and the trial court therefore did not abuse its discretion in denying defendant's motion for expert services where defendant was observed at Dorothea Dix Hospital by a doctor, was found to be competent to stand trial and was not diagnosed as suffering from any mental disorder; this finding of competency was made within a short time after the occurrence of the offenses charged against defendant; and defendant assisted with his defense, was under no medication before or at the time of trial, and was coherent at all times during trial.

Am Jur 2d, Criminal Law § 733.

Right of indigent defendant in state criminal case to assistance of psychiatrist or psychologist. 85 ALR4th 19.

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2. Criminal Law § 261 (NCI4th)— denial of continuance— no error

Defendant was not denied a reasonable time to prepare his defense by the trial court's denial of defendant's two motions for continuance, one made four days before trial and one made the day of trial, where defense counsel was appointed 47 days before trial; the probable cause hearing was held 39 days before the start of trial; defense counsel gave no notice that an insanity defense would be raised; and there were no discovery motions pending. N.C.G.S. § 15A-952(g).

Am Jur 2d, Continuance § 28.

3. Kidnapping and Felonious Restraint § 19 (NCI4th)— using victim as shield—second-degree kidnapping—sufficiency of evidence

Evidence was sufficient to support a verdict of guilty of second-degree kidnapping where it tended to show that defendant unlawfully restrained a man, removed him from one place to another for the purpose of using the man as a shield, and released him in a safe place without serious injury.

Am Jur 2d, Abduction and Kidnapping § 32.

4. Criminal Law § 1169 (NCI4th)— commission of offense while on pretrial release—consideration as aggravating factor proper

The trial court may consider as an aggravating factor that defendant committed an offense while on pretrial release on a misdemeanor charge, especially an offense which is so closely related to the later charge.

Am Jur 2d, Criminal Law §§ 598, 599.

5. Criminal Law § 1081 (NCI4th)— sentence—one aggravating factor outweighing three mitigating factors—no error

The trial court could properly find that the aggravating factor of defendant's preexisting charge of communicating threats to his victim outweighed three mitigating factors of defendant having no record of criminal convictions, defendant suffering from a mental condition that was insufficient to constitute a defense but somewhat reduced his culpability for the offense, and defendant being a person of good character and reputation.

Am Jur 2d, Criminal Law §§ 598, 599.

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6. Indictment, Information, and Criminal Pleadings § 9 (NCI4th) — caption listing one offense—body describing another—sufficiency of indictment to charge offense in body

The warrant and true bill of indictment properly charged defendant with the offense of assault with a deadly weapon upon a law enforcement officer, even if the caption on the true bill of indictment referred to the wrong statute, since the body of the indictment described a violation of the correct statute; the caption is not part of an indictment and can neither enlarge nor diminish the offense charged in the body; and an indictment is sufficient if it apprises defendant of the charge against him with enough certainty for him to prepare his defense and to be protected from subsequent prosecution for the same offense, which the indictment did in this case.

Am Jur 2d, Indictments and Information §§ 44, 45, 57.

Appeal by defendant from orders entered 16 October 1991 by Judge J. D. DeRamus, Jr. in Bertie County Superior Court. Heard in the Court of Appeals 13 April 1993.

Attorney General Lacy Thornburg, by Assistant Attorney General V. Lori Fuller, for the State.

Appellate Defender John R. Jenkins, Jr. for defendant-appellant.

JOHNSON, Judge.

Testimony at trial tended to show the following: Defendant dated Ella Brown for a period of six months; during the Fourth of July weekend in 1991, Ms. Brown told defendant she did not want to see him anymore. On 15 August 1991, prior to the offenses constituting this appeal, defendant was charged with communicating threats to Ms. Brown. Defendant was on pre-trial release from the 15 August 1991 charge when on 19 August 1991, defendant went to Ms. Brown's place of employment, the Perdue Factory, at which time defendant grabbed Ms. Brown's wrist and said, "I'm going to kill you." Defendant reached behind his back, brought out a gun, and dragged Ms. Brown into a hallway with the gun held to Ms. Brown's head. Mr. Billy Lassiter and two officers came upon the scene; Ms. Brown was able to struggle away from defendant and Mr. Lassiter helped Ms. Brown hide under a desk in an

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other office to which Mr. Lassiter had the key. Mr. Lassiter locked this office.

Defendant, looking for Ms. Brown, pointed his gun at Mr. Lassiter and asked where Ms. Brown was located, because defendant was going to kill her. Mr. Lassiter attempted to calm down defendant; defendant said, "The only way you can help me is to go out of the county with me." When Mr. Lassiter replied that he would not go out of the county with defendant, defendant answered, "Yes you are. You don't have any choice."

Defendant grabbed Mr. Lassiter's belt in the back, and pressed his gun into Mr. Lassiter's back. Defendant led Mr. Lassiter through several rooms looking for Ms. Brown. Deputy Ernest Howard approached the two men, and defendant said to him, "Don't bother me. I got a bullet for you too." Deputy Donald R. Cowan approached the men, and defendant, with the gun still in Mr. Lassiter's back, cocked the pistol while releasing Mr. Lassiter's belt, grabbing Mr. Lassiter's shirt collar and white coat collar from behind. Defendant kept Mr. Lassiter's body between himself and Deputy Cowan and told Deputy Cowan if he came any closer, defendant would shoot Mr. Lassiter.

Defendant gripped Mr. Lassiter's collar tighter and steered him out of the building. At this time, a third deputy drove up, got out of his patrol car and pointed his gun at defendant. Defendant placed Mr. Lassiter between himself and the deputy. Mr. Lassiter hit defendant's gun hand so that the gun fired, hitting defendant in the leg. At that point, defendant gave himself up.

Defendant was arrested and charged with seven offenses: first degree kidnapping of Billy Lassiter; assault on law-enforcement officer, Donald R. Cowan; communicating threats to Ernest Howard by telling him he had "a bullet" for him; communicating threats to Ella Brown by orally stating to her that he was going to kill her; assault on female Ella Brown, by grabbing the back of her neck, pushing and shoving her and causing her clothes to be ripped off when she attempted to flee; and going armed to the terror of the people, arming himself with a handgun, pointing it, swinging it in the air, and repeatedly shouting and threatening personnel, thus putting employees in fear of their lives.

On 28 August 1991, attorney John R. Jenkins, Jr. was appointed to represent defendant. On 5 September 1991, in district

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court, probable cause hearings on the felonies (first degree kidnapping of Billy Lassiter and assault on law enforcement officer, Deputy Cowan) were held. These two cases were bound over to the superior court for the grand jury. Trials and convictions on the remaining misdemeanor charges were held. These misdemeanor convictions were appealed to superior court.

Upon motion by defendant's attorney, on 12 September 1991, defendant was sent to Dorothea Dix Hospital for determination of defendant's competency to stand trial. On 25 September 1991, Dr. Patricio P. Lara of Dorothea Dix Hospital found defendant competent to stand trial.

On 7 October 1991, true bills of indictment were returned by the grand jury as to the felonies. On 9 October 1991, defendant's motion for authorization and state funds to employ independent psychologist and independent forensic psychiatrist was denied. On 10 October 1991, defendant moved for a continuance, and this was denied. On 14 October 1991, defendant was tried for these offenses. On 16 October 1991, defendant was found guilty of four felonies, kidnapping for the purpose of terrorizing, kidnapping for the purpose of holding a hostage, kidnapping for the purpose of using the victim as a shield, and assault with a deadly weapon upon a law enforcement officer. Defendant was also found guilty of three misdemeanors: communicating threats, assault upon a female, and intimidating a witness. Judgment was arrested for two of the three kidnapping charges. Defendant appealed to our Court.

I.

[1] Defendant first argues:

The defendant's statutory right to supporting services and his constitutional right to have a fair opportunity to present his defenses were denied by the [trial] court's denial of his motion for authorization and state funds to employ independent psychologist and independent psychiatrist, that was filed 9 October 1991, and by the court's denial of his motion to continue for arraignment and trial, in order that defendant's counsel would have time to privately employ an independent psychologist to advise and assist counsel in making adequate and necessary preparation for trial, that was filed 14 October 1991.

The right for an indigent defendant to have the assistance of an expert at state expense "is rooted in the Fourteenth Amend-

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ment's guarantee of fundamental fairness and the principle that an indigent defendant must be given a fair opportunity to present his defense." *State v. Parks*, 331 N.C. 649, 655, 417 S.E.2d 467, 471 (1992), *quoting State v. Tucker*, 329 N.C. 709, 718, 407 S.E.2d 805, 811 (1991). *See also State v. Tatum*, 291 N.C. 73, 81, 229 S.E.2d 562, 567 (1976); *State v. Johnson*, 317 N.C. 193, 344 S.E.2d 775 (1986); *Ake v. Oklahoma*, 470 U.S. 68, 84 L.Ed.2d 53 (1985). North Carolina General Statutes § 7A-450(b) (1989) provides "[w]henever a person . . . is determined to be an indigent person entitled to counsel, it is the responsibility of the State to provide him with counsel and the other necessary expenses of representation."

The proper standard for determining whether an indigent is entitled to a state-funded expert to assist in the preparation and presentation of his defense is found in *State v. Moore*, 321 N.C. 327, 335-36, 364 S.E.2d 648, 652 (1988):

In order to make a threshold showing of specific need for the expert sought, the defendant must demonstrate that: (1) he will be deprived of a fair trial without the expert assistance, or (2) there is a reasonable likelihood that it will materially assist him in the preparation of his case. *State v. Johnson*, 317 N.C. at 198, 344 S.E.2d at 778. . . . In determining whether the defendant has made the requisite showing of his particularized need for the requested expert, the court "should consider all the facts and circumstances known to it at the time the motion for psychiatric assistance is made." *State v. Gambrell*, 318 N.C. 249, 256, 347 S.E.2d 390, 394 (1986).

"The appointment of an expert for an indigent defendant is a matter addressed to the trial judge's discretion[.]" *State v. Stokes*, 308 N.C. 634, 644, 304 S.E.2d 184, 191 (1983).

On the facts herein, affidavits from family members and testimony at trial indicate that defendant's breakup with Ella Brown and recent surgery to his face may have contributed to his level of stress preceding 17 August 1991. Further, defendant was observed at Dorothea Dix Hospital by Dr. Patricio P. Lara, and was found to be competent to stand trial and was not diagnosed as suffering from any mental disorder. This finding of competency was made within a short time after the occurrence of the offenses charged against defendant. Defendant assisted with his defense, was under no medication before or at the time of trial, and was

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coherent at all times during trial. We find considering all of the evidence, defendant did not demonstrate specific need for such expert services, and we find no abuse of discretion by the trial court as to this matter.

II.

[2] Defendant next argues the defendant's right to necessary time to prepare and present his defense, as authorized by North Carolina General Statutes § 15A-952(g) (Cum. Supp. 1992) and as guaranteed by U.S. Const. amend. VI and XIV, was denied by the court's denial of his two motions for continuance on 10 October 1991 and 14 October 1991.

North Carolina General Statutes § 15A-952(g) states in pertinent part:

In superior or district court, the judge shall consider at least the following factors in determining whether to grant a continuance:

(1) Whether the failure to grant a continuance would be likely to result in a miscarriage of justice;

(2) Whether the case taken as a whole is so unusual and so complex, due to the number of defendants or the nature of the prosecution or otherwise, that more time is needed for adequate preparation[.] . . .

Our Supreme Court has stated "an accused and his counsel shall have a reasonable time to investigate, prepare and present his defense. However, no set length of time is guaranteed and whether defendant is denied due process must be determined under the circumstances of each case." *State v. McFadden*, 292 N.C. 609, 616, 234 S.E.2d 742, 747 (1977) (citations omitted). And, "a motion for continuance is ordinarily left to the sound discretion of the trial court 'whose ruling thereon is not subject to review absent an abuse of such discretion.'" *State v. Bunch*, 106 N.C. App. 128, 131, 415 S.E.2d 375, 377, *disc. review denied*, 332 N.C. 149, 419 S.E.2d 575 (1992), *quoting State v. Branch*, 306 N.C. 101, 104, 291 S.E.2d 653, 656 (1982). Even where the motion raises a constitutional issue, its denial results in a new trial only when the defendant shows "that the denial was erroneous and also that his case was prejudiced as a result of the error." *Bunch*, 106 N.C. App. at 131-32, 415 S.E.2d at 377; *Branch*, 306 N.C. at 104, 291 S.E.2d at 656.

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In *State v. Cobb*, 295 N.C. 1, 243 S.E.2d 759 (1978), our Supreme Court held that because defendant's appointed counsel had nearly six weeks to prepare for trial, where defendant had not yet even exercised discovery, denial of a continuance did not deny defendant's due process rights. In *State v. Moore*, 39 N.C. App. 643, 251 S.E.2d 647, *appeal dismissed by* 297 N.C. 178, 254 S.E.2d 39 (1979), our Court held seventeen days was an insufficient amount of time for defense counsel to prepare for trial. However, in *Moore*, defendant had filed a notice of intent to raise the defense of insanity, and had received no response to a motion for discovery. Further, in *Moore*, evidence showed that key witnesses would be unable to return to North Carolina in order to testify at the time scheduled for trial.

The record in the case *sub judice* reveals defense counsel was appointed on 28 August 1991, forty-seven days before trial on 14 October 1991. The probable cause hearing on the two felonies and trials and convictions in the five misdemeanors at district court occurred on 5 September 1991, thirty-nine days before the start of trial. Defense counsel gave no notice that an insanity defense would be raised, and had no discovery motions pending.

Reviewing all of the facts, we find no abuse of discretion committed by the trial court in its denial of defendant's two motions for continuance on 10 October 1991 and 14 October 1991.

III.

[3] Defendant further argues the trial court erred in denying defendant's motion to set aside the verdict of guilty of kidnapping for the purpose of using Billy Lassiter as a shield "as being contrary to the law and to the evidence."

North Carolina General Statutes § 14-39 (Cum. Supp. 1992) reads in pertinent part:

(a) Any person who shall unlawfully confine, restrain, or remove from one place to another, any other person 16 years of age or over without the consent of such person . . . shall be guilty of kidnapping if such confinement, restraint or removal is for the purpose of:

(1) Holding such other person for a ransom or as a hostage or using such other person as a shield; . . .

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(b) There shall be two degrees of kidnapping as defined by subsection (a). If the person kidnapped either was not released by the defendant in a safe place or had been seriously injured or sexually assaulted, the offense is kidnapping in the first degree and is punishable as a Class D felony. If the person kidnapped was released in a safe place by the defendant and had not been seriously injured or sexually assaulted, the offense is kidnapping in the second degree and is punishable as a Class E felony. . . .

Reviewing all of the evidence, we find the elements for second degree kidnapping were met. The evidence shows defendant unlawfully restrained Mr. Lassiter, removed him from one place to another for the purpose of using Mr. Lassiter as a shield, and that Mr. Lassiter was released in a safe place by the defendant and was not seriously injured. We find no error as to this assignment.

IV.

Defendant's final argument is that "[t]he trial court erred in imposing in the felony case sentence in excess of the presumptive sentence, in finding as an aggravating factor a misdemeanor that had been dismissed, and in finding that one (1) aggravating factor outweighed three mitigating factors; and the judgment [on the charge 'assault on law enforcement officer'] is void."

Defendant had a pre-existing charge of communicating threats to Ella Brown which was filed 13 August 1991. Before the entry of judgments and commitments in the charges stemming from 19 August 1991, the State took a dismissal in the pre-existing charge of communicating threats to Ella Brown. Defendant contends this pre-existing charge is not a meritorious aggravating factor because "that charge was not serious enough to be prosecuted." Further, defendant contends that giving greater weight to this aggravating factor than to three mitigating factors (those being "defendant has no record of criminal convictions," "defendant was suffering from a mental condition that was insufficient to constitute a defense but somewhat reduced his culpability for the offense," and "defendant has been a person of good character or has had a good reputation in the community in which he lives") was "contrary to the evidence and an abuse of the Trial Court's discretion."

[4] We find the trial judge properly considered the pre-existing charge of communicating threats to Ella Brown which was filed

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13 August 1991. We note that just as the trial court may properly consider as an aggravating factor "defendant committed the offense while on pretrial release on another felony charge," the trial court may consider that defendant committed an offense while on pretrial release on a misdemeanor charge, especially one which is so closely related to the later charge, as in this case.

[5] We further find, as our Supreme Court has held, the trial judge may properly find that one factor in aggravation outweighs more than one factor in mitigation. "The sentencing judge, even when required to find factors proved by uncontradicted, credible evidence, may still attribute whatever weight he deems appropriate to the individual factors found when balancing them and arriving at a prison term." *State v. Jones*, 309 N.C. 214, 219, 306 S.E.2d 451, 455, *appeal after remand*, 314 N.C. 644, 336 S.E.2d 385 (1983).

[6] Finally, defendant argues because the warrant and true bill of indictment refer to a violation of North Carolina General Statutes § 14-33(b)(4) (1986), when a person "[a]ssaults a law enforcement officer," the judgment should be void, because the judgment was based on a violation of North Carolina General Statutes § 14-34.2(1) (1986), when a "person . . . commits an assault with a firearm or any other deadly weapon upon any . . . law-enforcement officer." We note in the case at hand, although the caption on the true bill of indictment refers to North Carolina General Statutes § 14-33(b)(4), the wording in the body of the indictment describes a violation of North Carolina General Statutes § 14-34.2(1). We note "[t]he caption of an indictment, whether on the front or the back thereof, is not a part of it and the designation therein of the offense sought to be charged can neither enlarge nor diminish the offense charged in the body of the instrument." *State v. Bennett*, 271 N.C. 423, 425, 156 S.E.2d 725, 726 (1967). And, "an indictment is constitutionally sufficient if it apprises the defendant of the charge against him with enough certainty to enable him to prepare his defense and to protect him from subsequent prosecution for the same offense." *State v. Lowe*, 295 N.C. 596, 603, 247 S.E.2d 878, 883 (1978). We therefore find the warrant and true bill of indictment properly charged defendant with the offense of assault with a deadly weapon upon a law enforcement officer.

In the trial of defendant's case, we find no error.

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No error.

Judges ORR and McCRODDEN concur.

STATE OF NORTH CAROLINA v. CHRISTOPHER HUBERT RAMSEUR

No. 9325SC2

(Filed 2 November 1993)

1. Evidence and Witnesses §§ 782, 2047 (NCI4th)— first-degree sexual offense with minor—evidence of character trait excluded—no prejudicial error

There was no prejudicial error in a prosecution for first-degree sexual offense involving defendant's eight year old daughter where the trial court excluded testimony that defendant ". . . could not do anything like this." Although such testimony is routinely admitted when introduced by the State to show a defendant's tendency to molest a child and assuming that the statement was sufficient to bring defendant's character into issue, there was no prejudice from its exclusion, whether the nonconstitutional or the constitutional standard is applied, because defendant conceded that the child had had sexual contact with someone due to the presence of a sexually transmitted disease and the evidence at trial overwhelmingly indicated that the sexual contact was by defendant, despite his evidence that he tested negative for any sexually transmitted disease approximately two months after the child was tested. N.C.G.S. § 15A-1443(a).

Am Jur 2d, Appeal and Error § 807.

2. Rape and Allied Sexual Offenses § 206 (NCI4th)— first-degree sexual offense—indecent liberties—not a lesser included offense

The trial court did not err in a prosecution for first-degree sexual offense by not instructing the jury on taking indecent liberties with a minor because indecent liberties is not a lesser included offense of first-degree sexual offense.

Am Jur 2d, Rape § 110.

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3. Constitutional Law § 374 (NCI4th)— first-degree sexual offense—life sentence—not raised at trial—not unconstitutional

Although a defendant who was given two life sentences for two counts of first-degree sexual offense did not raise the question at trial, it was noted that a life sentence for first-degree sexual offense has been upheld as constitutional.

Am Jur 2d, Criminal Law § 625 et seq.

Appeal by defendant from judgments entered 23 July 1992 by Judge Robert M. Burroughs in Catawba County Superior Court. Heard in the Court of Appeals 29 September 1993.

On 23 July 1992, defendant was convicted of two counts of first degree sexual offense. G.S. 14-27.4. On 23 January 1993, defendant received a sentence of life imprisonment for each count. Defendant appeals.

The evidence presented by the State tended to show the following: the victim in this case (hereinafter "the child") is the biological daughter of defendant and Melissa Gillespie (hereinafter "the child's mother"). Defendant had regular visitation rights after his paternity was established by blood tests when the child was a year old. The child was eight years old at the time of the offense.

The child's mother testified as follows: during the school year, the child would stay at defendant's parents' home every other weekend; during the summer, including the period of July-August 1991 (the time of the alleged offenses), the child would stay at defendant's parents' home for two or three weeks at a time. The child called defendant "daddy." The child's mother was separated from her current husband, Howard Gillespie, during the time of the alleged offenses. The child had no contact with Mr. Gillespie since the inception of their separation in March 1988.

The child testified as follows: she called defendant "daddy." She described her paternal grandparents' house, where she spent time with defendant and her grandparents during the summer of 1991. She testified that just before her visit to the doctor in August 1991, she had stayed "with my mom but I had been visiting with my grandparents." The child was asked to identify her genitalia and referred to her genitalia as her "private." The child testified that the doctor examined her "private." The doctor asked if some-

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one had "bothered" her, and the child responded "my daddy." The doctor was the first person she told about this incident.

The child testified that she told the doctor that one night at her grandparents' house she finished watching television and went to her own bedroom where she fell asleep. The child was then asked on direct examination "how did you come to be in Mr. Ramseur's [defendant's] bedroom?" and the child responded "I just woke up. I first got in my bed and he took me to his bed." The child testified that defendant placed her on the bed in defendant's bedroom. Defendant removed her "panties." The child testified that defendant rubbed his hands "all over me" and that defendant "kissed me all over." The child testified that defendant licked her "on my private" and that during this time she was crying and scared. The child testified that defendant removed his clothes and rubbed his penis on her private parts.

The child was then asked "[h]ad your daddy ever done that to you before?" The child responded "yes" and stated "once was in the daytime" in the living room when "[g]randpa was at work and grandmother was gone." The child stated that "my daddy" removed her shorts and "panties." The child was then asked "[a]nd [when] you say your daddy, do you mean Chris Ramseur?" and the child responded "yes." Defendant rubbed his penis on her and it hurt. The child was asked, "[w]hy did you not tell somebody about that?" and the child responded "[b]ecause I was scared."

Dr. Moffead, a licensed doctor tendered as an expert witness in pediatric medicine, examined the child on 22 August 1991 after her mother brought her to his office to examine a vaginal discharge and "redness and irritation to the vaginal area." Dr. Moffead testified that the child tested positively for gonorrhea. Dr. Moffead's testimony corroborated the child's testimony at trial.

Patsy Ross of the Lincoln County Department of Social Services testified that she received Dr. Moffead's report and saw the child on 23 August 1991. She testified that the child told her that she (the child) had been abused by her daddy "more than once." Ms. Ross testified that "she [the child] said that her daddy had licked her on her private part and that he had put his penis part on her private part. . . . I asked her when was the last time it happened and she said she had just spent two weeks with her father and it happened while she was there with him." Additionally,

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Ms. Ross testified that "I asked her what her daddy[']s name was and she told me Chris Ramseur [defendant]."

Ms. Ross further testified that she interviewed the child jointly with Steve Lail of the Catawba County Sheriff's Department. During this interview, the child stated that one of the instances of sexual abuse occurred after she had been to Carowinds on 4 July 1991. Ms. Ross stated that "we came up with the 6th of July [1991]." The second instance was estimated as occurring on 13 August 1991. During the interview, the child demonstrated the sexual abuse with anatomically correct dolls. Again, the child specifically identified defendant as the person who sexually abused her. Mr. Lail's testimony at trial corroborated Ms. Ross' recitation of the child's testimony at the joint interview.

Defendant's evidence tended to show the following: the child's mother testified on cross-examination that while she and Mr. Gillespie lived together, the child called Mr. Gillespie "daddy." The child's mother also testified that the child also called one of her boyfriends, Mr. Bryant, "daddy." The child's mother further testified that she had another boyfriend, Rodney Brice, who was in jail from March 1991 until August 1991. The child's mother admitted that the child "called everyone that lived with you [the child's mother] daddy." The child's mother stated that defendant "was not a good daddy as far as really taking care of her."

Several of defendant's relatives testified. Defendant's father testified that from his own bedroom, he could see "anyone walking down the hall and entering the room where [the child] slept." He testified that the child was not in his house from 16 June 1991 until the end of July 1991. Defendant's mother testified that defendant "was not there during that time that much" and that the child was "just a happy little girl." Defendant's sister testified that the child did not appear to have any fear of defendant. She also testified that she (defendant's sister) slept in the room next to the child's bedroom.

Scott White, defendant's employer during the summer of 1991, testified that defendant worked six days per week and did not act sick during that time. Mr. White testified that he had known defendant from "the third grade to the 12th grade and graduated with him." Soon after defendant learned of the allegations against him, Mr. White recommended that defendant see a doctor. Mr.

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White took defendant to the Lincoln County Department of Social Services with the doctor's report.

Defendant testified that he was never alone with the child during the summer of 1991 and that he has never had a venereal disease. Dorothy Frye, a nurse, testified that defendant tested negative for venereal disease in October 1991. From the verdict and judgments entered, defendant appeals.

Attorney General Michael F. Easley, by Assistant Attorney General Diane G. Miller, for the State.

Appellate Defender Malcolm Ray Hunter, Jr., by Assistant Appellate Defender Mark D. Montgomery, for defendant-appellant.

EAGLES, Judge.

Defendant brings forward three assignments of error. Assignments of error not brought forward on appeal (Nos. 1, 2, 3, 4, and 5) are deemed abandoned. N.C.R. App. P. 28(b)(5). After a careful review of the briefs, transcript, and record, we conclude that defendant received a fair trial, free from prejudicial error.

I.

[1] In his sixth assignment of error, defendant contends that "[t]he trial court erred in excluding testimony of a pertinent trait of defendant's character. Defendant's employer, Scott White, would have testified that [he told a social worker] 'I did not think Chris [defendant] could do anything like this.' . . . Defendant is entitled to a new trial because he was not allowed to present evidence that he is not the kind of person to commit the crime for which he was being tried." We conclude that defendant is not entitled to a new trial.

Defendant contends that this statement infers "law abidingness" and that it was defendant's option to put his own character at issue. On the other hand, the State contends that the statement "was not evidence of a pertinent trait of defendant's character, but was simply White's opinion as to whether defendant was guilty of the alleged crimes." In his reply brief, defendant responds to the State's argument as follows:

[T]he testimony was not about what the witness thought the defendant actually did, but about what he had the *disposi-*

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tion to do. The witness' knowledge of the defendant's disposition would have been helpful to the jury. After all, the witness had known the defendant since high school.

Second, the testimony was not about whether the defendant did a particular act, but about whether he had the disposition to do acts *like* this. Such testimony is routinely admitted where it tends to show that the defendant has a tendency to molest children. It should be equally admissible where it tends to show the reverse.

(Emphasis in original.) Recognizing that such testimony is routinely admitted when introduced by the State to show a defendant's tendency to molest a child and assuming, without deciding, that the statement was sufficient to bring defendant's character into issue and therefore admissible, we find no prejudicial error here.

At this point we note that the State and defendant disagree as to the which standard of prejudicial error under G.S. 15A-1443 applies. The State argues that the nonconstitutional standard for prejudicial error applies. G.S. 15A-1443(a) ("A defendant is prejudiced by errors relating to rights arising other than under the Constitution of the United States when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises. The burden of showing such prejudice under this subsection is upon the defendant"). Defendant argues, citing *Michelson v. United States*, 335 U.S. 469, 93 L.Ed. 168 (1948), that there is a federal constitutional right to put one's character at issue and that the constitutional standard for prejudicial error applies. G.S. 15A-1443(b) ("A violation of the defendant's rights under the Constitution of the United States is prejudicial unless the appellate court finds that it was harmless beyond a reasonable doubt. The burden is upon the State to demonstrate, beyond a reasonable doubt, that the error was harmless"). However, our Supreme Court in *State v. Squire*, 321 N.C. 541, 549, 364 S.E.2d 354, 359 (1988) (homicide case) used the nonconstitutional standard of prejudicial error, G.S. 15A-1443(a), when the trial court erred in precluding defendant from introducing the testimony of a witness regarding defendant's character traits. Accordingly, we apply the nonconstitutional standard of prejudicial error here. G.S. 15A-1443(a).

The State argues that even if the exclusion of Mr. White's statement was error, it was harmless error. As noted *supra*, we

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assume *arguendo* that the trial court erred by excluding the statement. Defendant argues that the exclusion of the statement was highly prejudicial because "[t]he case was made closer by the evidence that there were other men who had access to [the child], other men she called 'daddy,' men who, unlike defendant, were in the good graces of her mother and grandmother" and points to the existence of a custody dispute between defendant's parents and the child's mother's parents.

We are not persuaded by defendant's argument and we conclude that defendant has failed to meet his burden under G.S. 15A-1443(a). In his brief, defendant concedes that at trial "[i]t was beyond dispute that [the child] had sexual contact with someone, owing to the presence of a sexually transmitted disease." The evidence at trial overwhelmingly indicated that the sexual contact was by defendant despite defendant's evidence that he tested negative for any sexually transmitted disease approximately two months after the child was tested. Here, the child's copiously detailed testimony was consistent with what she told every person with whom she spoke about the instances of abuse. We particularly note that on several occasions at trial the State was quite deliberate in having the child specify the person who sexually abused her. For example, the child testified that the doctor examined her "private" and asked her if anyone had been bothering her. The child testified that she responded to the doctor's question by answering "my daddy." The State then asked the child "[a]nd when you say your daddy, you are talking about Chris Ramseur, Mr. Brice, or Mr. Gillespie?" The child answered "Chris" and the State confirmed this answer by asking the child if "Chris" was the man seated in the courtroom. The child responded "yes." Furthermore, at the end of direct examination, the child testified as follows:

Q: And had anybody else that you know of done the same thing to you that your daddy did?

A: No sir.

Q: Did Roger Brice ever do anything like that to you?

A: No.

Q: Did Mr. Gillespie ever do anything like that to you?

A: No.

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Additionally, we note that Ms. Ross of the Lincoln County Department of Social Services testified that "from the very first day I talked to her" the child personally identified her father, Mr. Ramseur (defendant), as the person who committed the acts of sexual abuse. Based on the specificity of the child's testimony and the other evidence in the record, we find no merit in defendant's argument. Accordingly, we conclude that there is not a reasonable likelihood that the admission of Mr. White's statement would have produced a different result at trial. G.S. 15A-1443(a).

Finally, even assuming *arguendo* the applicability of the constitutional standard of prejudicial error, G.S. 15A-1443(b), we conclude after careful scrutiny of all the evidence that any error here was harmless beyond a reasonable doubt. Accordingly, this assignment of error fails.

II.

[2] In his seventh assignment of error, defendant argues that "[t]he trial court erred in not instructing the jury on taking indecent liberties with a minor." We disagree.

Our Supreme Court has repeatedly held that taking indecent liberties with a minor is not a lesser included offense of first degree sexual offense. *State v. Williams*, 303 N.C. 507, 514, 279 S.E.2d 592, 596 (1981); *State v. Ludlum*, 303 N.C. 666, 674, 281 S.E.2d 159, 164 (1981). See also *State v. Weaver*, 306 N.C. 629, 295 S.E.2d 375 (1982). Defendant argues that "[n]onetheless . . . the legislature intended indecent liberties to be a lesser included offense of both crimes [rape or sexual offense]." Based on the precedent established by *Williams* and *Ludlum*, we find no error.

III.

[3] In his eighth assignment of error, defendant argues that "[t]he sentence in this case constitutes cruel or unusual punishment in violation of defendant's state and federal constitutional rights." We disagree.

Defendant's argument was not raised before the trial court. "[I]t is well-established that appellate courts ordinarily will not pass upon a constitutional question unless it was raised and passed upon in the court below." *State v. Degree*, 322 N.C. 302, 309, 367 S.E.2d 679, 684 (1988) (citations omitted). Accordingly, we do not pass upon the question. However, we note that a life sentence

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rendered upon a conviction of first degree sexual offense has been upheld as constitutional. *State v. Higginbottom*, 312 N.C. 760, 763-64, 324 S.E.2d 834, 837 (1985) ("Clearly the legislature determined that whether or not accompanied by violence or force, acts of a sexual nature when performed upon a child are sufficiently serious to warrant the punishment mandated for Class B Felonies. Since it is the function of the legislature and not the judiciary to determine the extent of punishment to be imposed, we accord substantial deference to the wisdom of that body"). See also *State v. Cooke*, 318 N.C. 674, 351 S.E.2d 290 (1987); *Degree*, 322 N.C. 302, 367 S.E.2d 679. We find no error.

IV.

For the reasons stated, we conclude that the defendant received a fair trial, free from prejudicial error.

No error.

Judges ORR and GREENE concur.

JOHN L. BUFORD AND BETTY TATE BUFORD v. GENERAL MOTORS CORPORATION

No. 9221SC946

(Filed 2 November 1993)

1. Automobiles and Other Vehicles § 259 (NCI4th)— New Motor Vehicles Warranty Act—finding of unreasonable noncompliance—question for jury

Construing N.C.G.S. § 20-351.8(2) as a composite whole and giving the word "finding" its common and ordinary meaning, whether a manufacturer unreasonably refused to comply with N.C.G.S. § 20-351.2 or N.C.G.S. § 20-351.3 is a question for the jury when there is substantial evidence to support the claim.

Am Jur 2d, Automobiles and Highway Traffic § 721 et seq.

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2. Automobiles and Other Vehicles § 259 (NCI4th) — New Motor Vehicles Warranty Act — unreasonable refusal to comply with Act — evidence sufficient for jury

The trial court erred in directing a verdict for defendant on the issue of unreasonable noncompliance with the New Motor Vehicles Warranty Act where plaintiffs presented evidence that they had taken a Suburban in for repairs on over 30 occasions for a myriad of problems; the Suburban was out of service for repairs for over 40 days during the first year of ownership; plaintiffs communicated their complaints to the service manager at Parks Chevrolet, Mr. Parks, General Motors Corporation, and the Chevrolet Customer Assistance Division; and General Motors never offered to replace the vehicle or refund their money as required by N.C.G.S. § 20-351.3.

Am Jur 2d, Automobiles and Highway Traffic § 721 et seq.

3. Automobiles and Other Vehicles § 259 (NCI4th) — New Motor Vehicles Warranty Act — unreasonable noncompliance — attorney's fees

A trial court's order denying plaintiffs' request for attorney's fees in an action under the New Motor Vehicles Warranty Act was remanded where the determination of unreasonable noncompliance for purposes of trebling damages was also remanded for a jury determination. However, the trial judge, not the jury, makes the finding of unreasonableness required by N.C.G.S. § 20-351.8(3) for purposes of awarding attorney's fees, and the court may award attorney's fees in its discretion after making such a finding.

Am Jur 2d, Automobiles and Highway Traffic § 721 et seq.

4. Automobiles and Other Vehicles § 259 (NCI4th) — New Motor Vehicles Warranty Act — jury award — court-added requirement of return of vehicle — error

The trial court erred in an action under the New Motor Vehicles Warranty Act by ordering that plaintiff return the vehicle after the jury awarded a monetary verdict. The jury charge and the verdict form were both silent on this matter, so that the jury was free to assume that plaintiffs would retain ownership of the vehicle at the end of the litigation and the provision added by the court improperly changed the substance

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of the jury's verdict. Because the Warranty Act neither requires nor prohibits return of the defective vehicle to the manufacturer, the ownership must remain with the plaintiff in the absence of instructions to the jury regarding ownership of the vehicle if the manufacturer is found to have violated the Warranty Act.

Am Jur 2d, Automobiles and Highway Traffic § 721 et seq.**5. Judgments § 38 (NCI4th)— New Motor Vehicles Warranty Act—supplemental judgment out of session—vacated**

A supplemental judgment in an action under the New Motor Vehicles Warranty Act was vacated where the case was tried during the 30 March 1992 session; judgment was entered within the session; the trial judge entered the supplemental judgment on 11 May 1992; there is no evidence in the record that the session of court which began on 30 March was extended by the trial judge pursuant to N.C.G.S. § 15-167; and there is no evidence in the record that the parties consented to entry of the supplemental judgment beyond the 30 March session.

Am Jur 2d, Judgments § 60.

Appeal by plaintiffs from judgment entered 6 April 1992 and order and supplemental judgment entered 11 May 1992 in Forsyth County Superior Court by Judge Lester P. Martin, Jr. Heard in the Court of Appeals 8 September 1993.

Moore and Brown, by B. Ervin Brown, II, David B. Puryear, Jr., and R. J. Lingle, for plaintiff-appellants.

Petree Stockton, by Richard J. Keshian and Julia C. Archer, for defendant-appellee.

GREENE, Judge.

John and Betty Buford (plaintiffs), appeal from a portion of a judgment entered in their favor in the amount of \$20,766.00 in their action against General Motors Corporation (General Motors) under the New Motor Vehicles Warranty Act (the Warranty Act), N.C. Gen. Stat. §§ 20-351 through 20-351.10. Plaintiffs also appeal the denial of their motion for attorney's fees and the entry of a supplemental judgment.

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On 24 February 1989, plaintiffs purchased a 1989 Chevrolet Suburban from Parks Chevrolet, Inc. (Parks Chevrolet), an authorized dealer of General Motors automobiles, at a price of \$23,066.00. The plaintiffs financed \$16,000.00 of the purchase price. The Suburban was covered by a five-year, 50,000 mile warranty.

Plaintiffs first returned the vehicle to Parks Chevrolet for repairs on 2 March 1989. Over the course of the next three years, plaintiffs returned the vehicle to Parks Chevrolet or a Pennsylvania Chevrolet dealership for repairs on at least 31 different occasions. The primary problems were the continuous shaking and vibration of the doors, windows, and body panels, excessive brake wear, wind passing through the doors and windows, and vents which blew air the wrong way. Some of these problems were repaired after several attempts while others have never been repaired. Plaintiffs, because of the numerous repair attempts, were without the use of the vehicle for in excess of 40 days during the first year of ownership.

After complaining to Parks Chevrolet's service manager about the problems with his new vehicle, Mr. Buford met with the owner of Parks Chevrolet, Mr. Richard C. Parks (Mr. Parks), in March or April of 1989. Mr. Buford testified that Mr. Parks told him he could live with the problem, trade in the vehicle and take the loss, go to arbitration, or go to court. Mr. Buford further testified that Mr. Parks did not offer to replace the Suburban or to refund plaintiffs' money.

Plaintiffs contacted an attorney, who on 10 November 1989, wrote to Parks Chevrolet restating plaintiffs' complaints and stating that the vehicle was within the Warranty Act. This letter received no response, and plaintiffs' attorney's attempts to speak with Chevrolet's Customer Assistance Division and General Motors Corporation were unsuccessful. On 20 February 1990, plaintiffs' attorney wrote to both the Customer Assistance Division and General Motors stating plaintiffs' intent to file suit if the matter were not resolved. In response, General Motors arranged to have the vehicle inspected. Plaintiffs received a copy of the inspection sheet which showed that certain adjustments had been made in an attempt to fix some of the problems, while other complained-of problems could not be duplicated. At no time did General Motors offer to replace the vehicle or refund plaintiffs' money. Plaintiffs filed suit in Forsyth County Superior Court on 13 March 1991 alleging

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that General Motors had unreasonably refused to comply with the Warranty Act and was therefore liable to plaintiffs.

The case was tried during the 30 March 1992 session of Forsyth County Superior Court. At the close of all the evidence, General Motors moved for, and the trial court granted, a directed verdict on the issue of its unreasonable compliance with the Warranty Act. The jury returned a verdict for plaintiffs in the amount of \$20,766.00 and the trial court entered judgment for that amount, but conditioned plaintiffs' award of damages on the return of the vehicle to General Motors. Plaintiffs filed a motion, which the trial court denied, asking that they be awarded attorney's fees pursuant to N.C. Gen. Stat. § 20-351.8(3).

On 4 May 1992, plaintiffs filed notice of appeal from the portion of the judgment which required return of the vehicle and the denial of their motion for attorney's fees. On 11 May 1992, the trial court entered a supplemental judgment, based upon an earlier motion by defendant, which off-set the damages awarded to plaintiffs by the difference between the book value of a 1989 Suburban as of 6 April 1992, and the date upon which the vehicle and proper title were tendered to General Motors.

The issues are whether: (I) the finding of an unreasonable refusal to comply with the Warranty Act, for purposes of determining whether damages should be trebled, is to be made by the trial court or the jury; (II) if it is for the jury to make this finding, did plaintiffs present substantial evidence that General Motors unreasonably refused to comply with the Warranty Act; (III) the finding of an unreasonable failure or refusal to comply with the Warranty Act, for purposes of awarding attorney's fees to the prevailing party, is to be made by the trial court or the jury; (IV) the trial court had the authority to condition plaintiffs' recovery of money damages upon the return of the defective vehicle; and (V) the trial court had jurisdiction to enter the supplemental judgment.

N.C. Gen. Stat. § 20-351.8 provides:

In any action brought under this Article, **the court may** grant as relief:

- (1) A permanent or temporary injunction or other equitable relief as the court deems just;

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- (2) Monetary damages to the injured consumer in the amount fixed by the verdict. Such **damages shall be trebled upon a finding** that the manufacturer unreasonably refused to comply with G.S. 20-351.2 or G.S. 20-351.3. The jury may consider as damages all items listed for refund under G.S. 20-351.3;
- (3) **A reasonable attorney's fee** for the attorney of the prevailing party, payable by the losing party, **upon a finding by the court** that:
- a. The manufacturer unreasonably failed or refused to fully resolve the matter which constitutes the basis of such action; or
 - b. The party instituting the action knew, or should have known, the action was frivolous and malicious.

N.C.G.S. § 20-351.8 (1989) (emphases added).

I

[1] Section 20-351.8(2) requires the trebling of damages, as fixed by the jury verdict, upon a "finding" that the manufacturer was unreasonable in not complying with the Warranty Act. Because the statute does not specify who is to make this "finding," we utilize accepted rules of statutory construction to determine its meaning. Words of a statute must be "construed as a part of the composite whole and accorded only that meaning which other modifying provisions and the clear intent and purpose of the act will permit." *Vogel v. Reed Supply Co.*, 277 N.C. 119, 131, 177 S.E.2d 273, 280 (1970). In Section 20-351.8(2) the word "finding" is used in the second of three sentences. Both the first and last sentence have reference to the jury. Furthermore, words used in a statute must be given "their common and ordinary meaning unless another is apparent from the context, or unless they have acquired a technical significance." *Duke Power Co. v. Clayton*, 274 N.C. 505, 510, 164 S.E.2d 289, 293 (1968). The common and ordinary meaning of "finding" suggest a "decision upon a question of fact." *Black's Law Dictionary* 758 (4th ed. 1968). Questions of fact are normally resolved by a jury unless the parties consent to a non-jury hearing or the statute specifically provides otherwise. Thus, construing Section 20-351.8(2) as a "composite whole" and giving the word "finding" its common and "ordinary meaning," we hold that whether a "manufacturer unreasonably refused to comply with G.S. [§] 20-351.2

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or G.S. [§] 20-351.3" is a question for the jury when there is substantial evidence to support the claim.

II

[2] Plaintiffs presented evidence which showed that they have taken the Suburban in for repair on over 30 occasions for a myriad of problems. Plaintiffs also presented evidence which showed that the Suburban was out of service for repairs for over 40 days during the first year of ownership, that they communicated their complaints to the service manager at Parks Chevrolet, Mr. Parks, General Motors Corporation, and the Chevrolet Customer Assistance Division, but that General Motors never offered to replace the vehicle or refund their money as required by N.C. Gen. Stat. § 20-351.3.

Taking this testimony as true, plaintiffs presented substantial evidence to support submitting the issue of unreasonableness to the jury in that a reasonable mind could accept the evidence as sufficient to support the conclusion that General Motors unreasonably refused to comply with the Warranty Act. *See Hines v. Arnold*, 103 N.C. App. 31, 34, 404 S.E.2d 179, 181 (1991).

Accordingly, the trial court erred in directing a verdict on this issue and plaintiffs are entitled to a new trial. *See McFetters v. McFetters*, 98 N.C. App. 187, 191, 390 S.E.2d 348, 350, *disc. rev. denied*, 327 N.C. 140, 394 S.E.2d 177 (1990). Because this error is confined solely to the issue of General Motors' unreasonableness for purposes of N.C. Gen. Stat. § 20-351.8(2), and does not relate to the other issues already decided by the jury, we remand for a new trial only as to the issue of General Motors' unreasonableness as that term is used in Section 20-351.8(2). *See Robertson v. Stanley*, 285 N.C. 561, 568, 206 S.E.2d 190, 195 (1974) (partial new trial may be granted where the error is confined to one issue which is entirely separable from the other issues and it is clear there is no danger of complication or injustice being done to either party).

III

[3] Section 20-351.8(3) is specific in requiring that for purposes of awarding attorney's fees, it is the trial court that is to make the finding of whether a manufacturer has unreasonably failed or refused to comply with the Warranty Act or that the party bringing the action knew or should have known the action was frivolous or malicious. The terms "court" and "judge" are often used inter-

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changeably. *See, e.g., State v. Hedgepeth*, 330 N.C. 38, 52, 409 S.E.2d 309, 318 (1991) (“[T]he jury returned to the courtroom and requested that the **trial judge** define serious injury. The **court** responded . . .”); *State v. Johnson*, 317 N.C. 193, 200, 344 S.E.2d 775, 780 (1986) (“[D]efendant’s next argument relates to the instruction given to the jury by the **trial court**. The **trial judge** instructed . . .”); *see also Black’s Law Dictionary* 425 (4th ed. 1968) (“The words ‘court’ and ‘judge,’ or ‘judges,’ are frequently used in statutes as synonyms.”). We interpret the term “trial court” as used in N.C. Gen. Stat. § 20-351.8(3) to mean the trial judge. Therefore, for purposes of awarding attorney’s fees, it is the trial judge, not the jury, that is to make the finding required by N.C. Gen. Stat. § 20-351.8(3). After making such a finding, the court may, in its discretion, award attorney’s fees. *See Felton v. Felton*, 213 N.C. 194, 198, 195 S.E. 533, 536 (1938) (“The word ‘may’ as used in statutes in its ordinary sense is permissive and not mandatory.”); *see also* N.C.G.S. § 75-16.1 (1988) (under the act regulating unfair and deceptive acts or practices, “presiding judge may, in his discretion, allow a reasonable attorney fee to the duly licensed attorney representing the prevailing party”).

In this case, the trial judge, in allowing General Motors’ motion for a directed verdict on the issue of General Motors’ unreasonableness, determined as a matter of law that General Motors was not unreasonable. Because we have determined that there is substantial evidence of General Motors’ unreasonableness, we also reverse the trial court’s order denying plaintiffs’ request for attorney’s fees. On remand the trial judge must consider plaintiffs’ entitlement to attorney’s fees in light of the jury’s verdict on the issue of whether General Motors unreasonably refused to comply with the Warranty Act. Of course, the award of attorney’s fees remains in the discretion of the trial judge and will not be reversed absent an abuse of discretion.

IV

[4] A trial judge may not amend or change the substance of a verdict without the consent of the jury. *Southeastern Fire Ins. Co. v. Walton*, 256 N.C. 345, 348, 123 S.E.2d 780, 783 (1962). In this case, the jury was never instructed that the plaintiffs would be required to return the vehicle to General Motors. The jury charge and the verdict form were both silent on this matter, consequently, the jury was free to assume that plaintiffs would retain

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ownership of the vehicle at the end of the litigation. Nonetheless, the trial court, in entering judgment on the verdict, ordered that plaintiffs return the vehicle to General Motors. This provision of the judgment was not called for by the jury's verdict, and substantially diminishes the relief provided for by the verdict. As such, the added provision improperly changed the substance of the jury's verdict. *See id.* This provision is therefore vacated.

Because the Warranty Act neither requires nor prohibits return of the defective vehicle to the manufacturer, in the absence of instructions to the jury regarding ownership of the vehicle if the manufacturer is found to have violated the Warranty Act, the ownership must remain with the plaintiff.

V

[5] Except by agreement of the parties, a judgment of the superior court must be entered "during the term, during the session, in the county and in the judicial district where the hearing was held." *State v. Boone*, 310 N.C. 284, 287, 311 S.E.2d 552, 555 (1984); *see also Capital Outdoor Advertising, Inc. v. City of Raleigh*, 109 N.C. App. 399, 401, 427 S.E.2d 154, 155 (applying rule in civil case), *rev. allowed*, 333 N.C. 789, 430 S.E.2d 429 (1993). An order entered in violation of this rule is null and void. *Boone*, 310 N.C. at 287, 311 S.E.2d at 555.

This case was tried during the 30 March 1992 session and the judgment was entered within the session. The trial judge entered the supplemental judgment on 11 May 1992. There is no evidence in the record that the session of court which began on 30 March was extended by the trial judge pursuant to N.C. Gen. Stat. § 15-167 (trial judge may extend session, but must enter order extending session). Accordingly, the supplemental judgment was entered outside the 30 March session and because there is no evidence in the record that the parties consented to entry of the supplemental judgment beyond the 30 March session, *see Capital Outdoor*, 109 N.C. App. at 401, 427 S.E.2d at 155, the trial court was without jurisdiction to enter the supplemental judgment. The supplemental judgment must therefore be vacated.

In summary, we remand for a new trial on the issue of whether General Motors unreasonably refused to comply with the Warranty Act. If the jury determines General Motors unreasonably refused to comply with the Warranty Act, plaintiffs' damages of \$20,766.00

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must be trebled. After the jury makes its determination, the trial court must then consider whether plaintiffs are entitled to attorney's fees. The portion of the judgment conditioning plaintiffs' recovery of money damages upon return of the vehicle to General Motors and the supplemental judgment are vacated.

Vacated in part and remanded for a partial new trial.

Judges EAGLES and LEWIS concur.

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DEFENDANT AND THIRD-PARTY PLAINTIFF v. EDDIE LEWIS, THIRD-PARTY
DEFENDANT

No. 925SC996

(Filed 2 November 1993)

1. Uniform Commercial Code § 12 (NCI3d)— transaction as lease and not sales agreement—Uniform Commercial Code Art. 2 inapplicable

The agreement between the parties was a true lease of golf carts and not a disguised security agreement for the sale of goods, thus making implied warranty of fitness provisions of Article 2 of the Uniform Commercial Code inapplicable, where the agreement was designated a lease on its face and was for a fixed term of 48 months; the agreement provided the lessee with the option to purchase the golf carts at the end of the lease for their fair market value or 10% of the original sale price, whichever was less; and the purchase option was intended to approximate the depreciated fair market value of the golf carts. N.C.G.S. § 25-2-315.

Am Jur 2d, Sales § 37.

What constitutes a transaction, a contract for sale, or a sale within the scope of UCC Article 2. 4 ALR4th 85.

2. Sales § 81 (NCI4th)— lease of golf carts—integrated agreement—performance of warranties

The trial court properly determined that the agreement between the parties for the lease of golf carts contained, by

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integration, the "Golf Car Proposal" and the "Equipment Lease Agreement," and there was no genuine issue of material fact regarding defendant's performance of its warranty obligations where the forecast of evidence showed that defendant made periodic visits to repair the carts when informed by defendant of problems with the carts, and that the Equipment Lease Agreement disclaimed all warranties, including any warranties of merchantability and fitness.

Am Jur 2d, Sales § 840.

3. Appeal and Error § 178 (NCI4th)— summary judgment— notice of appeal—subsequent order awarding prejudgment interest, late fees, and attorney's fees

The trial court did not lack jurisdiction to hear motions for pre-judgment interest, late charges, and attorney's fees because plaintiff filed notice of appeal after the trial court granted defendant's motion for summary judgment on its counterclaim on 27 July and before the trial court awarded defendant pre-judgment interest, late charges, and attorney's fees on 27 August, since the trial court's order of 27 July was interlocutory and not subject to immediate appeal. Plaintiff's appeal from the 27 July order is treated as an exception to the granting of summary judgment which preserved plaintiff's right to appeal once the final order was entered, and plaintiff therefore could not oust the trial court's jurisdiction to settle and determine the entire controversy by filing its notice of appeal to the 27 July order.

Am Jur 2d, Appeal and Error § 352 et seq.

4. Costs § 34 (NCI4th)— attorney's fees—sufficiency of notice for recovery

Plaintiff lessee was given sufficient notice required by N.C.G.S. § 6-21.2(5) to entitle defendant lessor to recover attorney's fees where the lessor's notice of default, sent to the lessee by certified mail, stated the lessor's intention to exercise its paragraph 19 remedies under the lease, and paragraph 19 provides for the recovery of attorney's fees.

Am Jur 2d, Costs §§ 72-86.

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5. Usury § 1.1 (NCI3d)— late charges recoverable under lease— usury statutes inapplicable

Plaintiff could not prevail on its argument that late charges recoverable under the provisions of the parties' "Equipment Lease Agreement" were usurious interest prohibited by N.C.G.S. § 24-10.1, since the parties' transaction involved a lease, not a loan, and the provisions of Chapter 24 were therefore inapplicable.

Am Jur 2d, Interest and Usury §§ 112, 115.

Application of usury laws to transactions characterized as "leases". 94 ALR3d 640.

Appeal by plaintiff and third-party defendant from an order granting defendant's motion for summary judgment entered 27 July 1992 in New Hanover County Superior Court by Judge James D. Llewellyn. Plaintiff and third-party defendant also appeal from an order granting defendant's motion for late fees, pre-judgment interest, and attorney's fees entered 27 August 1992 in New Hanover County Superior Court by Judge G.K. Butterfield, Jr. Heard in the Court of Appeals 16 September 1993.

In August 1988, plaintiff and defendant signed a "Golf Car Proposal" which provided that defendant would lease to plaintiff 60 golf carts with battery chargers for 48 months. The "Golf Car Proposal" contained a two-year warranty on parts excluding batteries, chargers, tires, and tops, and a three-year warranty on motors and drivetrains. Plaintiff elected not to purchase a maintenance contract which would have provided bumper-to-bumper service and repair for all the golf carts. Before defendant delivered the golf carts, defendant mailed its standard lease agreement to plaintiff. The agreement disclaimed all warranties and provided that, in case of default by the lessee, the defendant could recover interest on the unpaid balance, legal fees, and late charges. The owner and manager of Beau Rivage, the third-party defendant, signed the agreement without reading it.

In November 1988, plaintiff began experiencing problems with the golf carts. The carts would not complete eighteen holes, and battery recharging required twice as long as anticipated. Defendant attempted to remedy the problems and made several visits to the golf course to make repairs. Despite these efforts, the problems

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continued. Plaintiff entered into a lease with another company and notified defendant on 19 February 1991 of its intent to terminate the agreement.

On 1 April 1991, plaintiff commenced this suit alleging breach of express and implied warranties. Defendant counterclaimed for the remaining lease payments, interest, late charges, and attorney's fees. Following a hearing, on 27 July 1992, Judge Llewellyn entered summary judgment for defendant, dismissing plaintiff's claim and allowing recovery by defendant on its counterclaim and reserving for later determination defendant's claim for pre-judgment interest, late fees, and attorney's fees. On 27 August 1992, Judge Butterfield entered his order awarding recovery of those damages to defendant. Plaintiff and third-party defendant have appealed from both orders.

Marshall, Williams & Gorham, by Lonnie B. Williams, for plaintiff and third-party defendant-appellants.

Armstrong & Armstrong, P.A., by L. Lamar Armstrong, Jr., for defendant and third-party plaintiff-appellees.

WELLS, Judge.

When a motion for summary judgment is granted, the questions for determination on appeal are whether, on the basis of the materials presented to the trial court, there is a genuine issue as to any material fact and whether the movant is entitled to judgment as a matter of law. *Smith v. Smith*, 65 N.C. App. 139, 308 S.E.2d 504 (1983).

[1] Plaintiff brings forth nine assignments of error. In the first assignment of error, plaintiff contends that the trial court erred in granting defendant's motion for summary judgment because there existed genuine issues of material fact regarding the nature of the agreement between the parties. We disagree.

Plaintiff argues that the agreement, although denominated an "Equipment Lease Agreement," is in reality a contract for the sale of goods because the agreement provided plaintiff with an option to purchase the golf carts for their fair market value or 10 percent of the original sales price, thereby making applicable the implied warranty of fitness for a particular purpose contained in Article 2 of the Uniform Commercial Code. The implied warranty of fitness for a particular purpose provides:

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Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified . . . an implied warranty that the goods shall be fit for such purpose.

N.C. Gen. Stat. § 25-2-315.

The presence of a purchase option does not *per se* make the agreement a contract for the sale of goods. *Alpiser v. Eagle Pontiac-GMC-Isuzu*, 97 N.C. App. 610, 389 S.E.2d 293 (1990). "The 'best test' to determine the agreement's purpose and the parties' intent is a 'comparison of the option price with the market value of the equipment at the time the option is exercised.'" *Id.* If the lessee can acquire the property under the option for little or no additional consideration, then the lease would be a disguised security agreement for the sale of goods. *Id.*

In the instant case, the agreement between the parties is designated a lease on its face and is for a fixed term of 48 months. The agreement provides the lessee with the option to purchase the golf carts for their fair market value or 10 percent of the original sales price, whichever is less. This purchase option indicates that the parties intended to engage in a true lease, not a disguised sale because the option price is the equipment's fair market value. *Id.* Furthermore, the forecast of the evidence discloses that the purchase option, calculated as 10 percent of the original sales price, was intended to approximate the depreciated fair market value of the golf carts. The agreement is therefore a true lease, making Article 2 of the Uniform Commercial Code inapplicable.

[2] Plaintiff also argues that the trial court erred in granting defendant's motion for summary judgment because the terms of the lease are ambiguous and there are genuine issues of material fact regarding defendant's performance of its warranty obligations. We disagree.

In August 1988, plaintiff and defendant signed a "Golf Car Proposal" which included the terms previously described. The "Equipment Lease Agreement," signed by the parties prior to delivery of the golf carts, disclaimed all warranties. The "Equipment Lease Agreement" stated: "Lessor makes no warranty with respect to the equipment, express or implied, and lessor specifically dis-

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claims any warranty of merchantability and of fitness for a particular purpose." The "Equipment Lease Agreement" also provided: "For other terms & conditions of this lease, see attached Golf Car Proposal."

The primary purpose of a court called upon to interpret a contract is to ascertain the intention of the parties, and the intention of the parties is a question of law. *Lane v. Scarborough*, 284 N.C. 407, 200 S.E.2d 622 (1973). When a second contract involves the same subject matter as the first contract, and no rescission has occurred, the contracts must be construed together. *In re Foreclosure of Fortescue*, 75 N.C. App. 127, 330 S.E.2d 219 (1985).

When the "Equipment Lease Agreement" and the "Golf Car Proposal" are read together, the terms of the agreement are not ambiguous, and the trial court properly determined that the agreement between the parties contained, by integration, the "Equipment Lease Agreement" and the "Golf Car Proposal."

The forecast of the evidence reflects that when plaintiff informed defendant of problems with the golf carts, defendant made periodic visits to make repairs on the carts. The forecast of the evidence supports the trial court's finding that there were no genuine issues of material fact regarding defendant's performance of its warranty obligations. Accordingly, we find no merit in plaintiff's first argument.

[3] In assignments of error numbers 4, 5, and 8, plaintiff argues that the trial court lacked jurisdiction to hear motions for pre-judgment interest, late charges, and attorney's fees because plaintiff filed notice of appeal after the trial court granted defendant's motion for summary judgment and before the trial court awarded defendant pre-judgment interest, late charges, and attorney's fees.

The trial court's order, entered 27 July 1992, granting defendant's motion for summary judgment ordered that:

2) Melex be, and hereby is, granted summary judgment against Beau Rivage on Melex's counterclaim in the principal amount of \$74,793.00, plus late fees and prejudgment interest as provided by the lease;

. . .

4) Melex be, and hereby is, awarded reasonable attorney's fees pursuant to G.S. 6-21.2 and the Lease Agreement. However,

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the Court reserves ruling on the amount of such fees until supporting affidavits are filed and a further hearing is conducted;

On 31 July 1992, defendant filed its motion for taxation of attorney's fees, costs, pre-judgment interest and other relief. On 12 August 1992, plaintiff filed its notice of appeal to this Court. On 27 August 1992, the trial court ordered plaintiff to pay defendant late fees, pre-judgment interest, and attorney's fees.

In support of its position, plaintiff cites and relies upon N.C. Gen. Stat. § 1-294 and the opinion of our Supreme Court in *Lowder v. Mills, Inc.*, 301 N.C. 561, 273 S.E.2d 247 (1981). Section 1-294 provides in pertinent part:

When an appeal is perfected as provided by this Article it stays all further proceedings in the court below upon the judgment appealed from, or upon the matter embraced therein; but the court below may proceed upon any other matter included in the action and not affected by the judgment appealed from.

While a literal reading of § 1-294, considered alone, would appear to support plaintiff's position, it is obvious that the threshold and dispositive question is whether the trial court's order of 27 July had the requisite finality to make it subject to immediate appeal. We are of the opinion that it did not.

We find guidance from our Supreme Court's opinion in *Industries, Inc. v. Insurance Co.*, 296 N.C. 486, 251 S.E.2d 443 (1979). In *Industries, Inc.*, the appellant attempted to appeal a trial court judgment which determined the issue of liability but left for further determination "the amount of damages suffered by plaintiff by reason of reasonable attorneys' fees, costs, expenses, and judgment and settlement amounts incurred and paid by plaintiff as a result of [plaintiff's] claims for damages." The Court discussed at length the provisions and implications of Rule 54(a) of the Rules of Civil Procedure and prior case law bearing on the finality of judgments in the context of their appealability and held that the judgment in that case was interlocutory and not appropriate for immediate appeal. The analogy between the case now before us and the case considered in *Industries, Inc.* is striking. We conclude that *Industries, Inc.* controls our disposition and hold that the trial court's order of 27 July was interlocutory and not subject to immediate appeal. Although the Court in *Industries, Inc.* dismissed the appeal as

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interlocutory, this case is different because plaintiff appeals from the whole judgment whereas in *Industries, Inc.* defendant appealed from partial summary judgment. We treat plaintiff's appeal from the trial court's order of 27 July as an exception to the granting of summary judgment which preserved plaintiff's right to appeal once the final order was entered. It follows, therefore, that plaintiff could not oust the trial court's jurisdiction to "settle and determine the entire controversy" by filing its notice of appeal to the 27 July order. *Id.* (quoting *Veazey v. Durham*, 231 N.C. 357, 57 S.E.2d 377, *reh'g denied*, 232 N.C. 744, 59 S.E.2d 429 (1950)). Accordingly, we overrule these assignments of error.

[4] In assignment of error number 10, plaintiff argues that because defendant failed to provide the notice required by N.C. Gen. Stat. § 6-21.2(5), defendant is not entitled to recover attorney's fees.

In order to recover attorney's fees pursuant to N.C. Gen. Stat. § 6-21.2(5), defendant was required to give plaintiff notice that it had five days to pay the outstanding balance owed without the attorney's fees and that if plaintiff paid the outstanding balance in full before the expiration of such time, then the obligation to pay the attorney's fees would be terminated.

The forecast of the evidence reflects that defendant did notify plaintiff by certified mail on 21 March 1991 of defendant's default of the lease agreement. The certified letter provided, in pertinent part:

This is a final notice. Unless you comply with the Equipment Lease Agreement No. 527, its all [sic] terms and conditions, and specifically, by effectuating the past due payment of \$4,320.00 and providing full and adequate storage and technical maintenance of the equipment within seven (7) days from the date of Notice of Default, we shall exercise our rights pursuant to paragraph 19 "Remedies" of the Lease

Paragraph 19 of the "Equipment Lease Agreement" provided that defendant, in the event of default, was entitled to recover pre-judgment interest and attorney's fees. Clearly, this letter provided plaintiff with the notice required under N.C. Gen. Stat. § 6-21.2(5).

[5] In assignments of error 6 and 7, plaintiff argues that the late charges recoverable under the provisions of the "Equipment Lease Agreement" are usurious interest prohibited by N.C. Gen. Stat. § 24-10.1. As the forecast of the evidence discloses that this

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transaction involved a lease, not a loan, the provisions of Chapter 24 are inapplicable, and plaintiff's assignments of error are overruled. *Kessing v. Mortgage Corp.*, 278 N.C. 523, 180 S.E.2d 823 (1971) (holding that the elements of a usury action include, *inter alia*, the presence of a loan and defining loan as "the delivery by one party and the receipt by the other party of a given sum of money, on an agreement, express or implied, to repay the sum lent, with or without interest").

The orders of the trial court granting defendant's motion for summary judgment and ordering payment of attorney's fees, pre-judgment interest, and late charges are

Affirmed.

Judges LEWIS and MARTIN concur.

STATE OF NORTH CAROLINA v. NICKY JAY HAMMOND, DEFENDANT

No. 9226SC524

(Filed 2 November 1993)

1. Criminal Law § 305 (NCI4th)— separate offenses—same defendant, victim, and circumstances—joinder proper

The trial court did not err in ruling that the charges of taking indecent liberties with a child and first-degree sexual offense could properly be joined for trial, since an adequate transactional connection existed in that the charges involved the same defendant, the same victim, and the same surrounding circumstances. N.C.G.S. § 15A-926(a).

Am Jur 2d, Actions § 159.5; Criminal Law § 20.

2. Rape and Allied Offenses § 86 (NCI4th)— time of offenses—testimony sufficient

In a prosecution of defendant for attempted first-degree rape, first-degree sexual offense, and taking indecent liberties with a child, the trial court properly denied defendant's motion to dismiss the charges made on the ground that the indictments and testimony were not sufficiently specific as to when the offenses occurred, since the minor child testified that the

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sexual acts committed by defendant occurred when she was in kindergarten, and this testimony established with some certainty the time frame during which the offenses occurred. N.C.G.S. § 15A-924(a)(4).

Am Jur 2d, Rape §§ 88, 89.

3. **Evidence and Witnesses § 2332 (NCI4th)— characteristics of sexually abused children—victim exhibiting characteristics—no expression of opinion on child's truthfulness—expert opinion admissible**

The trial court did not err in allowing an expert witness to discuss the symptoms and characteristics of sexually abused children and to express, in her expert opinion, whether the minor child exhibited such characteristics, and this testimony was not an improper opinion as to the child's truthfulness.

Am Jur 2d, Expert and Opinion Evidence §§ 211, 214, 217, 220.

4. **Evidence and Witnesses § 962 (NCI4th)— sexual abuse victim—picture drawn by child—counselor's testimony—admission under medical diagnosis and treatment exception to hearsay rule**

In a prosecution of defendant for attempted first-degree rape, first-degree sexual offense, and taking indecent liberties with a child, the trial court did not err by allowing a victim's assistance counselor to testify regarding a picture drawn by the minor child and by allowing the picture which had been labeled by the counselor into evidence, since the counselor's testimony and the picture on which the counselor had written the child's description of the drawing were properly allowed under the medical diagnosis and treatment exception to the hearsay rule. N.C.G.S. § 8C-1, Rule 803(4).

Am Jur 2d, Evidence §§ 718, 719.

Appeal by defendant from judgments entered 18 December 1991 by Judge Forrest A. Ferrell in Mecklenburg County Superior Court. Heard in the Court of Appeals 27 April 1993.

Lacy H. Thornburg, Attorney General, by Special Deputy Attorney General W. Dale Talbert, for the State.

Public Defender Isabel Scott Day, by Assistant Public Defender Anne Nicholson Hogewood, for defendant-appellant.

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JOHNSON, Judge.

Defendant Nicky Jay Hammond was indicted on 31 December 1990 for attempted first degree rape, first degree sexual offense, and taking indecent liberties with a child. The State filed a motion for joinder of these three offenses on 16 December 1991, which was granted. State's evidence tended to show the following: The minor child who is the subject of the charges against defendant lived with her mother, Felicia Sims, her younger brother and her father, defendant. The minor child first talked about this sexual abuse which was performed by the defendant while she was riding in a car with her aunt (her mother's half sister), Angela Mosier, on 5 October 1990. The minor child and her aunt were driving to pick up the minor child's mother from work. Mosier testified the minor child told her that defendant touched her private parts, and that defendant "would stick his thing in her butt, and . . . would use Vaseline" on both of them.

In response to these statements, Mosier and the minor child's mother went home and called the police. After they and the minor child were interviewed by the police, they took the minor child to the hospital to be examined.

Dr. Gary M. Howchins examined the minor child at the hospital. As a result of this examination, Dr. Howchins found no evidence of any general abuse, or forcible entry of the rectum, or tears or bleeding of the minor child's rectal or vaginal area. Dr. Howchins noted the vaginal lips were open, and that ordinarily in a young child, these lips stayed closed.

The minor child testified at trial that defendant would wait until everyone was asleep, then wake her and make her engage in sexual acts with him. She said defendant touched her on "[t]he back and front . . . of [her] private parts" and "[her] mouth." She was given anatomical drawings of a female child and a male adult to illustrate her testimony. She identified the appropriate areas on the drawings as private parts, and noted that defendant would stick his private part in her mouth and "make me suck the pee. Sometimes I get choke [sic]." The sexual acts were alleged to have taken place over a ten month period from January 1990 to September 1990.

Linda Ellis, a counselor who performs investigations for the Victim Assistance Rape Crisis Program, testified about her interac-

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tions with the minor child from 22 October 1990 to 30 April 1991. At one session, Ms. Ellis asked the minor child to draw and then explain a picture of what defendant had done to her. The minor child drew a picture of herself, crying, on top of the defendant, who was smiling because he "gets to do what he wants."

Patricia Mauney, a therapist for the Mecklenburg County Center for Mental Health, testified the minor child was involved in individual and group therapy with four to five other children ranging in age from six to eleven. Ms. Mauney's evaluation was that the minor child had a tendency to engage in sexual play with other children and had an age-inappropriate knowledge of sexual behavior. Ms. Mauney also testified the minor child exhibited low self esteem, anger, tearfulness, shame and hiding, depression, nightmares, and had delayed reporting the child abuse. In her expert opinion, Ms. Mauney testified all of these symptoms taken together suggested a very high probability that the minor child had been sexually abused.

Patricia Lampkin, the minor child's foster mother, testified about an incident she observed involving the minor child and her younger brother. Ms. Lampkin saw the younger brother on top of the minor child in a bedroom one afternoon; both children had their pants down, and their private parts were touching. Ms. Lampkin testified she asked the minor child why she was doing that, and that she said she was doing it because that is what her daddy did to her.

Angela Mosier testified that she and the minor child's mother took the minor child to the hospital on 5 October 1990 to have her examined. Ms. Mosier, on cross-examination, acknowledged she did not like defendant, and that she had tried on more than one occasion to get her half sister to separate from defendant.

The State also presented testimony from Felicia Sims, the minor child's mother; Anne Dodd from Mecklenburg County Youth and Family Services; and Jean Hall, a protective service investigator for the Department of Social Services.

Defendant testified on his own behalf, and denied these charges which were filed against him. Defendant further testified that he and Angela Mosier did not get along; that he and Felicia Sims had dated for almost ten years and had three children, one of whom was the minor child; that during the time he lived with Felicia Sims, the minor child came into their bedroom and observed

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him having sexual intercourse with Felicia Sims; and that the minor child had been exposed to male sexual organs because she had observed the boys next door urinating in the front yard. Defendant admitted to being convicted of assault on an officer on 23 June 1991. On cross-examination, defendant also acknowledged a similar conviction on 23 February 1988, a 1988 charge for obstructing an officer, and various other charges occurring from 1988 to 1991.

Mimi O. Whitler testified for defendant. Ms. Whitler testified that she babysat the minor child for defendant and Felicia Sims and that on one occasion, she entered a bedroom and observed the minor child on the bed on top of a little boy. Defendant's mother, brother, sister, and a neighbor, Shirley Robinson, also testified on his behalf.

Defendant was found guilty of first degree sexual offense and of taking indecent liberties with a child. From these judgments, defendant appealed to our Court.

[1] Defendant first argues the trial court abused its discretion by allowing the charges against defendant to be joined for trial. Defendant asserts that because the State could not identify the specific dates of the charges, the State could not join these charges as being closely connected in time, place and occasion.

North Carolina General Statutes § 15A-926(a) (1988) states in pertinent part: "Joinder of Offenses.—Two or more offenses may be joined in one pleading or for trial when the offenses, whether felonies or misdemeanors or both, are based on the same act or transaction or on a series of acts or transactions connected together or constituting parts of a single scheme or plan." Our Supreme Court has held:

[I]n deciding whether two or more offenses should be joined for trial, the trial court must determine whether the offenses are '*so separate in time and place and so distinct in circumstances as to render the consolidation unjust and prejudicial to defendant.*' (Citation omitted.) Thus, there must be some type of 'transactional connection' between the offenses before they may be consolidated for trial. (Citation omitted.) In addition, the trial judge's exercise of discretion in consolidating charges will not be disturbed on appeal absent a showing that the defendant has been denied a fair trial by the order of consolidation. (Citations omitted.)

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State v. Oxendine, 303 N.C. 235, 240, 278 S.E.2d 200, 203 (1981) (emphasis in original). The circumstances of the particular case must be considered in determining whether to grant a motion for joinder. *State v. Boykin*, 307 N.C. 87, 296 S.E.2d 258 (1982).

We find the trial judge did not err in ruling that the charges of taking indecent liberties with a child and first degree sexual offense could properly be joined, as we find an adequate "transactional connection" exists in that these charges involved the same defendant, the same victim, and the same surrounding circumstances. (See *State v. Swann*, 322 N.C. 666, 370 S.E.2d 533 (1988), where our Supreme Court upheld the joinder of two charges of first degree sexual offense and two charges of taking indecent liberties with a child between the same defendant and the same victim on more than one occasion.) We find no abuse of discretion by the trial judge as to this ruling.

[2] Defendant next argues the trial court erred by denying defendant's motion to dismiss where the indictments and the testimony presented were insufficient for defendant to effectively defend against the charges. Defendant claims "[a] more specific date was necessary for defendant to adequately prepare his defense. . . . Without a more specific date or dates, defendant was unable to offer an alibi for a nine month period or to offer proof that someone else around the child for a specific period may have committed the offenses."

North Carolina General Statutes § 15A-924(a)(4) (Cum. Supp. 1992) states a criminal pleading must contain:

A statement or cross reference in each count indicating that the offense charged was committed on, or on or about, a designated date, or during a designated period of time. Error as to a date or its omission is not ground for dismissal of the charges or for reversal of a conviction if time was not of the essence with respect to the charge and the error or omission did not mislead the defendant to his prejudice.

In *State v. Reynolds*, 93 N.C. App. 552, 378 S.E.2d 557 (1989), the defendant was found guilty of attempted first degree rape of a nine year old child. The State could not establish the specific time the offense occurred, only that it took place during the summer of 1986. Our Court held, pursuant to North Carolina General Statutes § 15A-924(a)(4), "[t]he State is not required to establish a specific date; . . . the State must only provide a statement of the approx-

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imate date or *period of time* during which the alleged offense occurred." *Reynolds*, 93 N.C. App. at 557, 378 S.E.2d at 560. (Emphasis in original.) Further, our Supreme Court has also considered the difficulty of young children attempting to identify exact dates crimes may have occurred. *E.g.*, *State v. Effler*, 309 N.C. 742, 309 S.E.2d 203 (1983).

In the case *sub judice*, the minor child testified that the sexual acts committed by defendant occurred when she was in kindergarten. This established with some certainty the time frame during which the offenses occurred. We find defendant's motion to dismiss the indictment was properly denied.

Defendant further argues the trial court erred by allowing testimony of prior uncharged acts allegedly committed by defendant. Specifically, defendant argues that on re-direct examination, Felicia Sims improperly testified that her husband "beat [her] all the time." Defendant argues that this "is highly inflammatory and was overly prejudicial." We have reviewed the transcript of this re-direct examination which took place, and we find that Ms. Sims was only explaining the testimony she gave during cross-examination. No error.

[3] Defendant next argues the trial court erred by allowing a therapist to testify regarding the minor child's truthfulness. Specifically, defendant refers to the following colloquy between the district attorney and Patricia Mauney:

Q. Ms. Mauney, based upon your training and experience, do you have an opinion whether the things that you've just listed for me—the sexual play, age inappropriate knowledge, low self esteem, the anger, tearfulness, shame and hiding, depression, nightmares, delayed reporting, and the feeling of responsibility for the abuse, are consistent with a child who has been sexually abused?

MS. BROOKS: Objection, Your Honor.

COURT: Overruled.

A. Yes. I do have an opinion.

Q. And what is your opinion?

A. I think none of these symptoms by itself is a total indication that sexual abuse is present, but I think with the clustering

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of these symptoms that [the minor child] showed, that there is a very high probability that she had been sexually abused.

Defendant asserts that this testimony "is in essence that [the minor child] is telling the truth." We disagree.

North Carolina General Statutes § 8C-1, Rule 702 (1992) states "[i]f . . . specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion." The record indicates that Ms. Mauney, a therapist at the Mecklenburg County Center for Mental Health, was properly qualified as an expert witness, and therefore, it was proper for her to discuss the symptoms and characteristics of sexually abused children and to express, in her expert opinion, whether the minor child exhibited similar characteristics. *See State v. Kennedy*, 320 N.C. 20, 357 S.E.2d 359 (1987). We find this testimony was admissible expert opinion testimony, and we overrule this assignment of error.

[4] Lastly, we address defendant's final two arguments. Defendant contends the trial court erred by allowing a counselor to testify regarding a picture drawn by the minor child and by allowing the picture, which had been "altered and labeled" by the counselor, into evidence. Specifically, defendant objects to the testimony of Linda Ellis, a counselor for the Victim's Assistance Program, as to a crayon picture drawn by the minor child.

During a therapy session, Ms. Ellis asked the minor child to describe the drawing to her, and Ms. Ellis recorded the minor child's responses directly on the drawing. Defendant argues that this is inadmissible hearsay. We disagree. We find Ms. Ellis' testimony and the admittance of the drawing into evidence by the trial judge was properly allowed as a hearsay exception, namely, North Carolina General Statutes § 8C-1, Rule 803(4) (1992):

Statements for Purposes of Medical Diagnosis or Treatment. — Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

As a counselor for the Victim's Assistance Program, Ms. Ellis properly could make notations as to the minor child's statements con-

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cerning the various parts of the drawing which the minor child herself drew. The recordation of these comments for future analysis and medical discussion directly pertained to diagnosis or treatment relating to the minor child, and was not improper. We overrule this assignment of error.

We find that defendant received a fair trial free from prejudicial error.

Judges ORR and MCCRODDEN concur.

STATE OF NORTH CAROLINA v. WILLIAM MICHAEL HODGE, DEFENDANT

No. 9210SC1286

(Filed 2 November 1993)

1. Narcotics, Controlled Substances, and Paraphernalia § 155 (NCI4th)— felonious possession of cocaine—sufficiency of evidence of constructive possession

Evidence was sufficient to support an inference of defendant's constructive possession of cocaine and therefore to support his conviction for felonious possession of cocaine where it tended to show that defendant was observed entering a pickup truck occupied by two other individuals after leaving the residence of a known drug dealer; an officer stopped the vehicle and observed drug paraphernalia protruding from defendant's shirt pocket; defendant stated that he intended to get high; and when defendant exited the vehicle an officer observed cocaine where defendant had been seated.

Am Jur 2d, Drugs, Narcotics and Poisons § 47.

2. Criminal Law § 1284 (NCI4th)— prosecution for cocaine possession and habitual felon—separate indictments—no error

There was no merit to defendant's contention that the habitual felon statute, N.C.G.S. § 14-7.3, required that the indictment charging him with the underlying felony must also charge that he was an habitual felon and that he could not be charged in a separate indictment with being an habitual felon.

Am Jur 2d, Habitual Criminals and Subsequent Offenders §§ 20, 21.

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3. Criminal Law § 1283 (NCI4th)— habitual felon indictment— name of state omitted—indictment not fatally flawed

An habitual felon indictment was not fatally flawed because it did not state specifically the name of the state or other sovereign against whom two of the previous felonies were committed, since the indictment alleged that one felony was committed in "Wake County, North Carolina" and two other felonies were committed in "Wake County"; the description of defendant's three prior felony convictions was contained in the same sentence, separated only by semi-colons; the use of "Wake County" to describe the sovereignty against which the felonies were committed was clearly a reference to Wake County, North Carolina; and defendant was not prevented from preparing an adequate defense because the indictment did not include the words "North Carolina."

Am Jur 2d, Habitual Criminals and Subsequent Offenders §§ 20, 21.

4. Criminal Law § 1281 (NCI4th)— habitual felon— no denial of equal protection or due process

Defendant's prosecution as an habitual felon neither denied him due process or equal protection of the law nor subjected him to double jeopardy, nor was his fourteen-year minimum sentence excessive.

Am Jur 2d, Habitual and Subsequent Offenders §§ 2, 5.

5. Criminal Law § 1281 (NCI4th)— habitual felon statute— principal felony different from underlying felonies— statute constitutionally applied

The habitual felon statute is not unconstitutional as applied to defendant because it authorized enhanced sentencing where the principal felony differed from the felonies which established him as an habitual felon.

Am Jur 2d, Habitual Criminals and Subsequent Offenders §§ 2, 3, 5.

6. Criminal Law § 1283 (NCI4th)— habitual felon— file in another case with similar name— same defendant— evidence admissible

Where defendant was charged with being an habitual felon, the trial court did not err in admitting the original file in another case in the name of "Michael Hodge," since, for the

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purposes of N.C.G.S. § 14-7.4, "Michael Hodge" and defendant "William Michael Hodge" were the same name, and the documents at issue constituted *prima facie* evidence that defendant named in the file was the same as defendant before the court.

Am Jur 2d, Habitual Criminals and Subsequent Offenders
§§ 2, 5, 26.

Appeal by defendant from judgment entered 2 September 1992 by Judge F. Gordon Battle in Wake County Superior Court. Heard in the Court of Appeals 28 September 1993.

Defendant was charged in a proper bill of indictment in case No. 91 CRS 85692 with felonious possession of cocaine and, in a separate bill of indictment in case No. 92 CRS 6647, with being an habitual felon under G.S. § 14-7.1. His motion to dismiss the habitual felon indictment was denied. The State's evidence in case No. 91 CRS 85692 tended to show that on 22 November 1991 the Wake County Sheriff's Department was conducting a surveillance of the home of a known drug dealer in Zebulon, North Carolina. Detective Stone observed defendant leave the residence and enter the passenger side of a pickup truck. The vehicle was driven by another male and a female passenger occupied the center of the passenger seat. After following the vehicle away from the residence, Detective Stone stopped the vehicle and asked the driver for his license and registration. At that time, Detective Stone observed a piece of drug paraphernalia protruding from defendant's shirt pocket. Defendant told the detective that he intended to get "high."

After defendant exited the truck, Detective Stone observed a small quantity of crack cocaine on the truck seat where defendant had been seated. Detective Stone thereafter arrested defendant. While en route to the magistrate's office, defendant told Stone that he was a drug user, not a drug seller, and that he had purchased the crack cocaine so that he could go home and get high. Defendant later said that the cocaine was not his, but that the driver of the vehicle had put the cocaine beneath defendant when the officer stopped the vehicle. Defendant did not present any evidence and the jury returned a verdict of guilty.

The trial court then conducted a proceeding pursuant to G.S. § 14-7.5 to determine defendant's status as an habitual felon. The State's evidence tended to show that defendant had previously

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been convicted of felony common law robbery and two counts of felonious breaking and entering. Defendant presented no evidence and the jury returned a verdict finding defendant to be an habitual felon. Judgment was entered sentencing defendant to imprisonment for a term of 14 years. Defendant appealed.

Attorney General Michael F. Easley, by Assistant Attorney General Jeffrey P. Gray, for the State.

John T. Hall for defendant-appellant.

MARTIN, Judge.

Defendant assigns as error the trial court's denial of his motion to dismiss the charge of felonious possession of cocaine in case No. 91 CRS 85692. In addition, defendant makes numerous assignments of error relating to the verdict finding defendant to be an habitual felon. For the reasons set forth herein, we conclude that defendant received a fair trial, free from prejudicial error.

[1] Defendant first assigns error to the trial court's denial of his motion to dismiss the charge of felonious possession of cocaine in case No. 91 CRS 85692. In ruling upon a motion to dismiss, the trial court must examine the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences which may be drawn from the evidence. *State v. Sanders*, 95 N.C. App. 494, 504, 383 S.E.2d 409, 415, *disc. review denied*, 325 N.C. 712, 388 S.E.2d 470 (1989). The court must determine whether there is substantial evidence of each essential element of the crime charged, and if so, the motion must be denied and the case submitted to the jury. *State v. Styles*, 93 N.C. App. 596, 602, 379 S.E.2d 255, 260 (1989). " 'Substantial evidence' is that amount of relevant evidence that a reasonable mind might accept as adequate to support a conclusion." *State v. Cox*, 303 N.C. 75, 87, 277 S.E.2d 376, 384 (1981).

Constructive possession of a controlled substance applies where the defendant "has both the power and intent to control its disposition or use." *State v. Harvey*, 281 N.C. 1, 12, 187 S.E.2d 706, 714 (1972). When the substance is found on the premises under the exclusive control of the defendant, this fact alone may support an inference of constructive possession. *State v. Givens*, 95 N.C. App. 72, 76, 381 S.E.2d 869, 871 (1989). If the defendant's possession over the premises is nonexclusive, constructive

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possession may not be inferred without other incriminating circumstances. *Id.*

The State's evidence showed that defendant was observed entering a pickup truck occupied by two other individuals after leaving the residence of a known drug dealer. When Detective Stone stopped the vehicle he observed drug paraphernalia protruding from defendant's shirt pocket. When asked what the paraphernalia was used for, defendant responded that he was going home to get "high." Defendant was then asked to exit the vehicle, whereupon Detective Stone observed a small amount of cocaine on the pickup truck seat where defendant had been seated. Defendant later stated to Detective Stone that he used, but did not sell cocaine and that he bought the cocaine so that he could go home and get "high." Although defendant later stated that the cocaine did not belong to him and that it had been placed underneath him by the vehicle's driver, this contradiction is to be resolved in favor of the State for purposes of the motion. *State v. Moose*, 310 N.C. 482, 313 S.E.2d 507 (1984).

This evidence, taken in the light most favorable to the State, tends to show that the cocaine was found in a place not within defendant's exclusive possession. However, defendant's possession of cocaine paraphernalia, the location of the substance beneath defendant's body, and his statements that he bought the cocaine so that he could get high are substantial incriminating circumstances from which defendant's constructive possession of the cocaine could be inferred. *State v. McLaurin*, 320 N.C. 143, 357 S.E.2d 636 (1987). This assignment of error is overruled.

[2] Defendant assigns error to the denial of his motion to dismiss the habitual felon indictment on the ground that the indictment failed to comply with G.S. § 14-7.3. Defendant first contends that the statute requires that the indictment charging defendant with the underlying felony must also charge that defendant is an habitual felon; in this case he was charged in one bill of indictment with felonious possession of cocaine, and in a separate bill of indictment with being an habitual felon. Defendant argues that this alleged noncompliance with G.S. § 14-7.3 renders the indictments invalid. We disagree.

Our Supreme Court has previously resolved this issue against defendant in *State v. Todd*, 313 N.C. 110, 326 S.E.2d 249 (1985)

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and *State v. Allen*, 292 N.C. 431, 233 S.E.2d 585 (1977). In *Allen*, the Court stated:

Properly construed this act clearly contemplates that when one who has already attained the status of an habitual felon is indicted for the commission of another felony, that person may then be also indicted *in a separate bill* as being an habitual felon. (Emphasis added.)

State v. Allen, 292 N.C. at 433, 233 S.E.2d at 587. Based on *Todd* and *Allen*, we reject defendant's argument.

[3] Defendant also contends that the habitual felon indictment was fatally flawed because it did not contain the requisite allegations under G.S. § 14-7.3, which provides that indictments charging a person with being an habitual felon must set forth the name of the state or other sovereign against whom the previous felonies were committed. Defendant argues that the indictment is invalid because in two instances, it refers only to "Wake County" without naming any state. We disagree.

"The purpose of an indictment is: (1) to give the defendant notice of the charge against him to the end that he may prepare his defense . . . ; and (2) to enable the court to know what judgment to pronounce in case of conviction." *State v. Russell*, 282 N.C. 240, 243-44, 192 S.E.2d 294, 296 (1972). The habitual felon indictment in the present case alleges that the felony of common law robbery was committed in "Wake County, North Carolina," and that the two subsequent felonies were committed in "Wake County." The description of defendant's three prior felony convictions is contained in the same sentence, separated only by semi-colons. The use of "Wake County" to describe the sovereignty against which the felonies were committed, is clearly a reference to Wake County, North Carolina. We cannot discern, and defendant does not suggest, how he was prevented from preparing an adequate defense because the indictment utilized the words "Wake County" rather than "Wake County, North Carolina." Defendant's assignments of error related to the denial of his motion to dismiss the habitual felon indictment on statutory grounds are overruled.

[4] Defendant next assigns as error the trial court's denial of his motion to dismiss the habitual felon indictment on constitutional grounds. Defendant argues that the Habitual Felon Act, G.S. § 14-7.1 *et seq.*, is unconstitutional as written and as applied to

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him. Specifically, defendant argues that prosecution under the statute denies him due process and equal protection of the law and subjects him to double jeopardy and cruel and unusual punishment. We disagree.

In *State v. Todd*, 313 N.C. 110, 326 S.E.2d 249 (1985), the Court held that the procedures set forth in G.S. § 14-7.1 *et seq.*, comport with a criminal defendant's federal and state constitutional guarantees. *Todd*, 313 N.C. at 118, 326 S.E.2d at 253. However, a sentence may be vacated on the ground of excessiveness if the defendant shows "an abuse of discretion, procedural conduct prejudicial to defendant, circumstances which manifest inherent unfairness or injustice, or conduct which offends the public sense of fair play." *Id.* at 119, 326 S.E.2d at 254, *quoting*, *State v. Ahearn*, 307 N.C. 584, 598, 300 S.E.2d 689, 697 (1983).

Based on *Todd*, we hold that defendant's prosecution as an habitual felon neither denied him due process or equal protection of the law nor subjected him to double jeopardy. Likewise, we are not persuaded that defendant's sentences are excessive. As an habitual offender, a defendant must be sentenced as a class C felon and shall not receive a sentence of less than 14 years imprisonment. N.C. Gen. Stat. § 14-7.6. Class C felons are punishable by imprisonment up to 50 years, or by life imprisonment. N.C. Gen. Stat. § 14-1.1(a)(3). Defendant was found to be an habitual offender and was sentenced to fourteen years of imprisonment, the minimum sentence allowed under the habitual felon statute. In light of the maximum sentence allowed under the statute, as well as defendant's history of felony convictions, we hold that defendant has failed to show an abuse of discretion, procedural misconduct, unfairness, injustice, or conduct offensive to the public sense of fair play. *See State v. Aldridge*, 76 N.C. App. 638, 334 S.E.2d 107 (1985) (Imposition of a thirty year sentence for an habitual felon who could have received a maximum sentence of life imprisonment does not constitute cruel and unusual punishment.) This assignment of error is overruled.

[5] Defendant also argues that the habitual felon statute is unconstitutional as applied to him on the ground that it authorizes enhanced sentencing where the principal felony differs from the felonies which establish defendant as an habitual felon. According to defendant, he could only be sentenced as an habitual offender for felonious possession of cocaine if his prior convictions were

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also for felonious possession of cocaine. We reject this novel proposition. G.S. § 14-7.1 declares that an habitual felon is a person “who has been convicted of or plead guilty to three felony offenses” We believe that the manifest intent of the General Assembly in enacting the Habitual Felon Act was to insure lengthier sentences for those persons who repeatedly violate our criminal laws. Nowhere in the Act do we find any indication that the Act was intended to apply only to those persons who repeatedly violate the same criminal law, and we decline to write any such requirement into the law. This assignment of error is overruled.

[6] By his next assignments of error, defendant contends the trial court erred by admitting into evidence certain documents contained in State’s Exhibit 12. Exhibit 12 was the original file in case number 90 CRS 72404 in the name of “Michael Hodge.” The State’s purpose for introducing these documents was to show that the “Michael Hodge” convicted of breaking and entering in case number 90 CRS 72404, was the defendant in the present case, William Michael Hodge. Defendant argues that the trial court erred by admitting these documents because the State failed to present a *prima facie* basis for their admission. We disagree.

G.S. § 14-7.4 provides in pertinent part:

A prior conviction may be proved by stipulation of the parties or by the original or a certified copy of the court record of the prior conviction. The original or certified copy of the court record, bearing the same name as that by which the defendant is charged, shall be *prima facie* evidence that the defendant named therein is the same as the defendant before the court, and shall be *prima facie* evidence of the facts set out therein.

In *State v. Petty*, 100 N.C. App. 465, 397 S.E.2d 337 (1990), this Court held that “Martin Bernard Petty” and “Martin Petty” were the “same name” for purposes of G.S. § 14-7.4. *Id.* at 470, 397 S.E.2d at 341.

In the present case, the documents introduced to prove defendant’s prior conviction for breaking and entering in case 90 CRS 72404 were all identified as accurate copies of the originals. Each of the documents indicated that defendant’s name in 90 CRS 72404 was “Michael Hodge.” Based on the decision in *Petty*, we hold that for purposes of G.S. § 14-7.4 “Michael Hodge” and “William Michael Hodge” are the same name, and that the documents at

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issue therefore constituted *prima facie* evidence that the defendant named in 90 CRS 72404 was the same as the defendant before the court. This assignment of error is overruled.

Defendant also argues that the trial court erred by denying his motion to dismiss the habitual felon indictment on the ground of insufficiency of the evidence. Defendant bases this contention on the premise that the judgment in case 90 CRS 72404 was inadmissible. Having already determined that the judgment in case 90 CRS 72404 was properly admitted, we overrule this assignment of error.

No error.

Judges WELLS and LEWIS concur.

PATTI JEAN GREGORY, JOHNNIE B. LYTTLE, A. C. SEWELL, T. A. SEWELL AND WIFE, NADINE S. SEWELL, EMILY G. TURNER, WILSON E. ANDERSON, AND LIDA M. STAPLETON, PLAINTIFFS v. ANNA F. FLOYD AND THOMAS E. NEWMAN, DEFENDANTS

No. 922DC454

(Filed 2 November 1993)

1. Easements § 9 (NCI4th)— reference to “BEACH” on map and in deeds—easement created

An easement appurtenant was created as to an area identified as the “BEACH” on subdivision maps where defendant and her husband recorded the subdivision map upon which all but two of the purchasers of property in the subdivision relied; this subdivision map set out the subdivided lots in the subdivision and further set out the location of the “BEACH”; and the deeds held by all the purchasers of homes in the subdivision, except the deed to one husband and wife, referred to this subdivision map.

Am Jur 2d, Easements and Licenses §§ 17, 22, 23.

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2. Deeds § 68 (NCI4th)— conveyance of one lot in subdivision — duty of subsequent purchaser to investigate prior conveyance — notice of easement to subsequent purchaser

Plaintiffs, at the time they originally took title to their lots, were on record notice that one lot in the subdivision had already been conveyed, and plaintiffs were therefore under a duty, regardless of the filing of the later subdivision map, to investigate that conveyance to see what it might contain relative to any conditions, easements, or dedications as to the remainder of the subdivision. Had plaintiffs done so, they would have discovered the easements specifically identified by the language in the prior deed and would have known that, though the map referred to a "BEACH" area extending from the waterfront through marshlands to the divided lots, the deed contained a specific reference to the "BEACH" with a more limited description.

Am Jur 2d, Covenants, Conditions and Restrictions §§ 304-310.

Appeal by plaintiffs from order entered 30 January 1992 by Judge Hallett Ward in Hyde County District Court. Heard in the Court of Appeals 13 April 1993.

Carter, Archie & Hassell, by Sid Hassell, Jr., for plaintiffs-appellants.

Ward & Smith, P. A., by John M. Martin, for defendant-appellee Thomas E. Newman.

Davis & Davis, by George Thomas Davis, Jr., for defendant-appellee Thomas E. Newman.

Rodman, Holscher, Francisco & Peck, P. A., by Edward N. Rodman, for defendant-appellee Anna F. Floyd.

JOHNSON, Judge.

This is an action brought by plaintiff homeowners in a subdivision in response to plans by the original owner of the entire subdivision to sell off the remaining portions of the land, in particular, a portion believed to be a "common area," identified on the recorded plat as "BEACH."

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The facts of this appeal are as follows: On 14 October 1970, E. V. Floyd (now deceased) and wife, defendant Anna F. Floyd, had a survey prepared and recorded with the Registrar of Deeds in Hyde County of a subdivision of certain lands owned by them as tenants by the entirety. This subdivision map identified specific lots in the subdivision, but made no reference to a "BEACH." On 8 March 1971, E. V. Floyd and Anna F. Floyd conveyed one lot identified in this subdivision plat to George G. Williams and wife, Mildred M. Williams. This conveyance contained the following language, which followed a metes and bounds description of the property:

The foregoing courses are magnetic as of 1970 and this lot will be designated as Lot No. "49" on the final sub-division map of the Swan Quarter Canal Property.

The parties of the first part do also convey to the parties of the second part, their heirs and assigns . . . an easement or right to use the boat ramp that has been constructed and is now located on the Southwest side of Fodrey Creek, together with a right to use the crescent beach located on the Southwest side of Fodrey Creek, which beach is located approximately 65 feet in a southwestwardly direction from the Southwest edge of the above referred to ramp and said beach has a water front of 100 feet and is 30 feet deep.

On 5 April 1971, another subdivision plat of this subdivision was prepared and on 28 June 1971 was recorded with the Registrar of Deeds in Hyde County. On this map, the location of the boat ramp is indicated by an arrow and the word "BEACH" is written in the unsubdivided portion of the property.

When the Floyds were marketing this subdivision, they distributed a flyer which advertised that one could "Fish from the 1 mile of Island Shoreline," and that there was a "Boat Ramp and Sandy Beach for use of lot owners." The map of the subdivision on this flyer has a handwritten notation indicating the location of the "BEACH." At least one of the plaintiffs was given a copy of this flyer.

Over the years, the lots identified in the subdivision map were sold to various parties; in addition, four parcels of land within the unsubdivided area were sold. These lands sold which were within the unsubdivided area have not been improved since they were sold.

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On 2 June 1989, E. V. Floyd and defendant Anna F. Floyd contracted to sell their remaining interest in the subdivision to defendant Thomas E. Newman. Upon notice of this pending sale, plaintiffs brought this suit.

On 18 September 1991, each defendant filed a motion for summary judgment. On 30 January 1992, the trial judge granted summary judgment in favor of defendant Newman as to all plaintiffs, and summary judgment in favor of defendant Floyd as to all plaintiffs except Johnnie B. Lyttle and Wilson E. Anderson. From this order, plaintiffs appeal to our Court.

Plaintiffs argue the trial court committed reversible error in allowing summary judgment in favor of defendant Newman and in favor of defendant Floyd (except as to the claims of plaintiffs Lyttle and Anderson) because there were genuine issues of fact as to whether the actions of the developers created a private easement in all of the unsubdivided portion of the subdivision in favor of the purchasers of the numbered lots therein. Particularly, plaintiffs assert that they, as lot owners in this subdivision, "had private easements in all of the unsubdivided lands in the subdivision by dedication or estoppel from the developers." Plaintiffs rely upon the recorded plat which labels this unsubdivided land within the subdivision as "BEACH."

Summary judgment is appropriate only when there is no genuine issue of material fact and a party is entitled to judgment as a matter of law. North Carolina General Statutes § 1A-1, Rule 56 (1990). The moving party has the burden of establishing the lack of any triable issue, and may meet this burden by proving that an essential element of the opposing party's claim is nonexistent. All inferences of fact from the proof offered at the hearing must be looked at in the light most favorable to the nonmoving party. *Mozingo v. Pitt County Memorial Hospital*, 331 N.C. 182, 415 S.E.2d 341 (1992).

[1] At issue in this case is whether an easement appurtenant was created and if so, the extent to which this easement exists. An easement appurtenant is an easement which attaches to, passes with, and is an incident of ownership of the particular tract of land; this easement may be created by dedication, may be either a formal or informal transfer, and may be either express or implied. *Shear v. Stevens Building Co.*, 107 N.C. App. 154, 418 S.E.2d 841

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(1992); *Gibbs v. Wright*, 17 N.C. App. 495, 195 S.E.2d 40 (1973); *Spaugh v. Charlotte*, 239 N.C. 149, 79 S.E.2d 748 (1954).

As indicated in *Shear*, 107 N.C. App. at 162, 418 S.E.2d at 846, our Supreme Court set out the applicable rules for the establishment of an appurtenant easement by the use of a plat map in *Realty Co. v. Hobbs*, 261 N.C. 414, 421, 135 S.E.2d 30, 35-36 (1964):

Where lots are sold and conveyed by reference to a map or plat which represents a division of a tract of land into streets, lots, parks and playgrounds, a purchaser of a lot or lots acquires the right to have the streets, parks and playgrounds kept open for his reasonable use, and this right is not subject to revocation except by agreement. (Citations omitted.) It is said that such streets, parks and playgrounds are *dedicated* to the use of lot owners in the development. In a strict sense it is not a dedication, for a dedication must be made to the public and not to a part of the public. (Citation omitted.) (Emphasis in original.) It is a right in the nature of an easement appurtenant. Whether it be called an easement or a dedication, the right of the lot owners to the use of the streets, parks and playgrounds may not be extinguished, altered or diminished except by agreement or estoppel. (Citations omitted.) This is true because the existence of the right was an inducement to and a part of the consideration for the purchase of the lots. (Citations omitted.) Thus, a street, park or playground may not be reduced in size or put to any use which conflicts with the purpose for which it was dedicated. (Citations omitted.)

See also Hinson v. Smith, 89 N.C. App. 127, 365 S.E.2d 166, *disc. review denied*, 323 N.C. 365, 373 S.E.2d 545 (1988), where an area designated as "Beach" on a recorded subdivision plat was held dedicated to the private use of the owners and purchasers of lots in the subdivision.

The record herein reveals that E. V. Floyd and Anna F. Floyd recorded the subdivision map upon which all of the purchasers of property in the subdivision (except George G. Williams and Mildred M. Williams and subsequent purchasers of their property) relied on 28 June 1971. This subdivision map sets out the subdivided lots for sale in the subdivision, and further sets out the location of the "BEACH." The deeds held by all of the purchasers of homes in this subdivision (except the Williams' deed and subsequent purchasers of their property) refer to this subdivision map. Pursuant

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to *Shear and Hinson*, we have examined the contents of the subdivision map herein and the actions of E. V. Floyd and Anna F. Floyd in selling and conveying these lots in reference to this map, and we find that an easement has been created as to this area identified as the "BEACH." We now address the extent of this easement.

[2] Plaintiffs argue that because the subdivision map refers to a "BEACH" area extending from the waterfront through the marshlands to the divided lots, this entire area should be considered the "BEACH." Defendants argue that because the Williams' deed contains a specific reference to the "BEACH" with a more limited description, this description should control, and that therefore, the marshlands lawfully belong to Anna F. Floyd.

In *Stegall v. Robinson*, 81 N.C. App. 617, 344 S.E.2d 803, *disc. review denied*, 317 N.C. 714, 347 S.E.2d 456 (1986), our Court made reference to *Reed v. Elmore*, 246 N.C. 221, 98 S.E.2d 360 (1957), which discussed the performance of a proper title examination. In *Reed*, our Supreme Court quoted with approval from *Finley v. Glenn*, 303 Pa. 131, 154 A. 299 (1931):

The controlling factor . . . is that the immediate grantors of both plaintiff and defendants were the same. When the latter came to examine the title which was tendered to them, it was of primary consequence that they should know whether their grantors held title to the land which they were to convey. They could determine that question only by searching the records for grants from them. . . . 'The weight of authority is to the effect that if a deed or a contract for the conveyance of one parcel of land, with a covenant or easement affecting another parcel of land owned by the same grantor, is duly recorded, the record is constructive notice to a subsequent purchaser of the latter parcel. The rule is based generally upon the principle that a grantee is chargeable with notice of everything affecting his title which could be discovered by an examination of the records of the deeds or other muniments of title of his grantor.' (Citations omitted.)

Reed, 246 N.C. at 231, 98 S.E.2d at 367. As noted in *Stegall*, Professor Webster speaks unkindly of this rule:

In view of the holding of *Reed v. Elmore*, a purchaser of real property in North Carolina must examine all recorded "out" conveyances made by prior record titleholders during

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the periods when they respectively held title to the property to determine if any such owner has expressly imposed a restriction upon the use of the property. The difficulty in discovering all existent restrictive covenants that grow out of *Reed v. Elmore* is easily demonstrable. The case charges purchasers with constructive notice of all that "could be discovered by a search of the deeds and records, whether within the direct chain of conveyances or outside the direct chain of conveyances. . . . When this requirement is considered with the rule existent that deeds are construed as a whole and meaning is given to every part without reference to formal divisions of the deed, it becomes obvious that the title searcher is given an entirely impracticable and unreasonable task.

J. Webster, *Webster's Real Property Law* in N.C. § 503 at 687-88 (Hetrick and McLaughlin, rev. ed. 1988). Nonetheless, *Reed* remains good law today.

Therefore, we find plaintiffs, at the time they originally took title to their lots, were on record notice that one lot in this subdivision had already been conveyed, and plaintiffs therefore were under a duty to investigate that conveyance to see what it might contain relative to any conditions, easements or dedications as to the remainder of the subdivision. This was plaintiffs' duty regardless of the filing of the later subdivision map. Had plaintiffs done so, they would have discovered the easements specifically identified by the language in the Williams conveyance relative to the use of the boat ramp and the location and description of the crescent beach.

We note these easements specifically identified by the language in the Williams' deed and appearing on the later subdivision map are easements which have been granted to all homeowners in the subdivision, as all of the homeowners' deeds refer to this later subdivision map upon which the "BEACH" and boat ramp appear.

We find the trial judge properly allowed summary judgment in favor of defendant Newman and in favor of defendant Floyd (except as to the claims of plaintiffs Lyttle and Anderson) because no genuine issues of fact exist as to the extent of the easement which was created.

The decision of the trial court is affirmed.

Judges ORR and MCCRODDEN concur.

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[112 N.C. App. 477 (1993)]

STATE OF NORTH CAROLINA v. ANTOINE LAVELLE SANDERS

No. 9226SC1339

(Filed 2 November 1993)

1. Searches and Seizures § 77 (NCI4th) — license check — defendant detained and searched — evidence seized — no unreasonable detention — suppression of evidence not required

There was no merit to defendant's contention that the trial court should have granted his motion to suppress evidence seized from his person because the officers' initial stop of him was an unreasonable detention under principles of the Fourth Amendment, since defendant was stopped at a roadblock set up for the purpose of checking drivers' licenses and registrations, and such spot checks do not amount to unreasonable detention.

Am Jur 2d, Searches and Seizures §§ 52, 190.**2. Searches and Seizures § 82 (NCI4th) — officer's suspicion that defendant armed — determination to frisk reasonable**

An officer's determination to frisk defendant was lawful where defendant appeared to stop before approaching a license check point; once at the check point, defendant informed the officer that he was carrying no identification, did not own the vehicle, and could provide no registration for the car; the officer could reasonably suspect that the car might have been stolen; the officer legitimately asked defendant to step out of the car; the officer then observed a bulge in defendant's pocket; the officer's concern that defendant might be armed was reasonable; and the officer could properly ask defendant to turn around and put his hands on the car so the officer could search him for weapons.

Am Jur 2d, Searches and Seizures §§ 51, 78.**3. Searches and Seizures § 58 (NCI4th) — frisk proper — seizure of cocaine unreasonable**

An officer properly frisked defendant where there was no evidence that the officer felt a packet of cocaine in defendant's pocket in a manner that invaded the privacy of defendant beyond a pat down for weapons; however, because the officer was never asked and did not testify about whether it was

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immediately apparent to him that the item he felt was contraband, his seizure of the packet of cocaine was unreasonable under the Fourth Amendment and the cocaine could not be used as evidence against defendant.

Am Jur 2d, Searches and Seizures § 161.

Appeal by defendant from judgment entered 15 September 1992 by Judge Robert W. Kirby in Mecklenburg County Superior Court. Heard in the Court of Appeals 28 September 1993.

Defendant was charged with two counts of trafficking in drugs, in violation of N.C. Gen. Stat. § 90-95(h) (Supp. 1992). On 31 July 1992, he filed a motion to suppress evidence seized from his person without a warrant. After hearing testimony and arguments on the motion, the trial court denied defendant's motion to suppress. Defendant then entered pleas of guilty to trafficking in cocaine by possession and trafficking in cocaine by transportation. He appeals, challenging, pursuant to N.C. Gen. Stat. § 15A-979(b) (1988), the trial court's order denying his motion to suppress.

Attorney General Michael F. Easley, by Special Deputy Attorney General Robin P. Pendergraft, for the State.

Paul J. Williams for defendant.

MCCRODDEN, Judge.

Defendant attacks the trial court's denial of his motion to suppress on two bases: (1) the officers' initial stop of him was an unreasonable detention, and (2) the search of him and the subsequent seizure of cocaine were unconstitutional under the Fourth Amendment. The evidence presented at the hearing on the motion to suppress tended to show the following. During the afternoon of 27 March 1992, Troopers V.C. Lessane and Brian Gregory of the North Carolina Highway Patrol set up a driver's license check at the west ramp of North Carolina Highway 16 at Beattie's Ford Road in Mecklenburg County. They posted no signs warning the public that a license check was being conducted. The troopers checked every car that approached the check point unless they were busy writing citations.

At approximately 1:45 in the afternoon, a white Pontiac Grand Am driven by defendant exited Highway 16 and entered the west ramp. As defendant approached the check point, he appeared to

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come to a complete stop about 150 feet away from Trooper Lessane. Defendant then drove up to the check point, stopped the car, and rolled down his window. In response to Trooper Lessane's request for his driver's license and registration, defendant informed him that he did not have any identification, did not have the registration, and was not the owner of the car. The passenger in the car also failed to produce any identification.

Trooper Lessane then asked defendant to get out of the car. As defendant stepped from the vehicle, Trooper Lessane noticed a bulge about the size of two fists in the right pocket of defendant's jacket. The trooper then told defendant to face the car and place his hands on the car so that he could pat defendant down for weapons.

As defendant turned away from Trooper Lessane and placed his hands on the car, Trooper Lessane observed plastic protruding from the right pocket. While frisking defendant, the officer touched the bulge and noted that it felt like "hard flour dough." Trooper Lessane then removed from defendant's pocket a plastic bag which contained three smaller bags holding cocaine.

[1] We first address defendant's argument that the trial court should have granted his motion to suppress evidence produced by the search and seizure because the officers' initial stop of him was an unreasonable detention under principles of the Fourth Amendment made applicable to the States by the Fourteenth Amendment. *Mapp v. Ohio*, 367 U.S. 643, 6 L.Ed.2d 1081 (1961). In support of his contention, defendant cites the case of *Delaware v. Prouse*, 440 U.S. 648, 59 L.Ed.2d 660 (1979). We find compliance with the principles enunciated in *Prouse*, and we reject defendant's argument.

In *Prouse*, the Supreme Court, holding that stopping an automobile and detaining its occupants implicated the Fourth Amendment prohibition against unreasonable seizures, stated:

[E]xcept in those situations in which there is at least articulable and reasonable suspicion that a motorist is unlicensed or that an automobile is not registered, or that either the vehicle or an occupant is otherwise subject to seizure for violation of law, stopping an automobile and detaining the driver in order to check his driver's license and the registration of the automobile are unreasonable under the Fourth Amendment.

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Id. at 663, 59 L.Ed.2d at 673. *Prouse*, however, excepted from this general rule systematic roadblocks by which law enforcement officers stop all cars or use some random method of selecting cars to stop in order to check licenses and registrations. The Court specifically allowed states to develop methods for "spot checks that involve less intrusion or that do not involve the unconstrained exercise of discretion. Questioning of all oncoming traffic at roadblock-type stops is one possible alternative." *Id.* at 663, 59 L.Ed.2d at 673-74.

In the case at hand, the two troopers, following guidelines established by their agency, selected a location and time during daylight hours for a license check. The troopers detained every automobile that passed through the check point, with the exception of those that came through while the officers were issuing citations to the operators of other vehicles. We can find no Fourth Amendment violation in the troopers' actions, and we overrule this assignment of error.

[2] We next address defendant's argument that the trial court should have granted his motion to suppress evidence of the cocaine seized by Trooper Lessane because the search of his person and the seizure of cocaine violated his Fourth Amendment rights. This argument requires us to apply the "stop and frisk" law of *Terry v. Ohio*, 392 U.S. 1, 20 L.Ed.2d 889 (1968), and the "plain feel" exception to the requirement of a warrant for seizing contraband, as set forth in *Minnesota v. Dickerson*, --- U.S. ---, 124 L.Ed.2d 334 (1993).

The Fourth Amendment guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." The United States Supreme Court has stated that searches and seizures conducted outside the judicial process are *per se* unreasonable, subject to only a few specific, well delineated exceptions. See *Minnesota v. Dickerson*, --- U.S. at ---, 124 L.Ed.2d at 343-44. Such an exception was recognized in *Terry*, a case in which the U.S. Supreme Court held that an officer may conduct a pat down search, for the purpose of determining whether the person is carrying a weapon, when the officer is justified in believing that the individual is armed and presently dangerous. *Terry*, 392 U.S. at 24, 20 L.Ed.2d at 908; see *Dickerson*, --- U.S. at ---, 124 L.Ed.2d at 344.

Defendant argues that Trooper Lessane was not justified under *Terry* in frisking him because the officer did not have "the slightest

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hint" that he carried a weapon. We disagree. The North Carolina Supreme Court in *State v. Peck*, 305 N.C. 734, 291 S.E.2d 637 (1982), held that in certain situations it is reasonable to seize a person and subject him to a limited search for weapons. In determining when it is reasonable to do so, the *Peck* Court adopted the *Terry* standard, *i.e.*, "whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger." *Id.* at 742, 291 S.E.2d at 642. The Court stated:

[W]here a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous, where in the course of investigating this behavior he identifies himself as a policeman and makes reasonable inquiries, and where nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own or others' safety, he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such person in an attempt to discover weapons which might be used to assault him.

Id. at 741, 291 S.E.2d at 641 (quoting *Terry*, 392 U.S. 1, 30, 20 L.Ed.2d 889, 911).

In applying this standard to the facts in the instant case, it is clear that Trooper Lessane was justified in conducting a limited search of defendant for weapons because he could reasonably have concluded that defendant was involved in criminal activity and that the defendant might be armed. The evidence shows that, when defendant exited Highway 16 and entered the ramp, he appeared to stop before approaching the license check point; once at the check point, defendant informed Trooper Lessane that he was carrying no identification, did not own the vehicle, and could provide no registration for the car. In light of his unusual behavior, Trooper Lessane legitimately asked defendant to step out of the car. *See State v. Hudson*, 103 N.C. App. 708, 407 S.E.2d 583 (1991), *disc. review denied*, 330 N.C. 615, 412 S.E.2d 91 (1992). Trooper Lessane testified that people who are driving stolen cars often provide officers with false names and insist that they have no identification. We find these facts sufficient to create a reasonable suspicion that

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criminal activity might be afoot, to wit: that the car might have been stolen.

Furthermore, after observing defendant's suspicious conduct, Trooper Lessane noticed a bulge in defendant's jacket pocket as defendant exited the vehicle. He testified that he was "mainly concerned about a weapon" and determining whether defendant was armed was the "number one thing." At the roadblock he asked defendant to turn around and put his hands on the car so that he could search him for weapons. Due to defendant's behavior and the bulge in defendant's jacket pocket, it was reasonable for Trooper Lessane to believe that defendant might have been armed.

[3] Having concluded that Trooper Lessane's determination to frisk defendant was lawful under the Fourth Amendment, we must next determine whether Trooper Lessane was acting within the bounds marked by *Terry* during the frisk. We hold that he was. In *Dickerson*, the Supreme Court stated that:

If a police officer lawfully pats down a suspect's outer clothing and feels an object whose contour or mass makes its identity immediately apparent, there has been no invasion of the suspect's privacy beyond that already authorized by the officer's search for weapons; if the object is contraband, its warrantless seizure would be justified by the same practical considerations that inhere in the plain view context.

Id. at ---, 124 L.Ed.2d at 346. The Court analogized the tactile discoveries of contraband to the plain-view doctrine, finding that the plain-view doctrine has an obvious application to instances in which an officer discovers contraband through his sense of touch during an otherwise lawful search. *Id.* at ---, 124 L.Ed.2d at 345-46. The *Dickerson* Court was concerned that, in conducting a search of this nature, an officer not go beyond the invasion of privacy necessary to determine whether the subject has a weapon. In the case before it, the Court determined that the officer had overstepped the bounds of *Terry* when, without believing the object to be a weapon, he squeezed, slid and otherwise manipulated the contents of the defendant's pockets.

In the case before us, we believe that the trooper's actions in frisking were within the bounds of *Terry*. There is no evidence that Trooper Lessane felt the packet of cocaine in a manner that invaded the privacy of defendant beyond a pat down for weapons.

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Dickerson, however, makes it clear that, prior to a lawful seizure, the identity of the contraband must be "immediately apparent," and on this requirement the State's case falls short. Trooper Lessane testified at the hearing on the motion that he observed a bulge in defendant's pocket and suspected a weapon; when, at his request, defendant leaned over his vehicle for a pat down, Trooper Lessane observed about an inch of plastic protruding from the same pocket. At that point he suspected drugs. His testimony made clear, however, that the main focus of the pat down was to ascertain whether defendant was armed. As he patted the pocket, he testified, he felt an object like "hard flour dough." He removed the packet of cocaine.

The State's case for using the seized contraband at trial, made prior to the Supreme Court's opinion in *Dickerson*, was deficient in one important aspect: Trooper Lessane was never asked and did not testify about whether it was immediately apparent to him that the item he felt was contraband. Failing this, his seizure of the packet of cocaine was unreasonable under the Fourth Amendment and may not be used as evidence against defendant.

We consequently reverse the trial court's order denying defendant's motion to suppress and remand to the trial court for a determination of the motion to suppress in light of *Dickerson* and the foregoing opinion. See *Foundry Co. v. Benfield*, 266 N.C. 342, 145 S.E.2d 912 (1966).

Reversed and remanded.

Judges JOHNSON and COZORT concur.

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[112 N.C. App. 484 (1993)]

WADE MILLER, AND WIFE, JONAH MILLER; AND TONY FUTCH, AND WIFE,
MABEL FUTCH, PLAINTIFFS v. KENNETH A. TALTON AND JOHN
ARTHUR TALTON, DEFENDANTS

No. 9211SC611

(Filed 2 November 1993)

1. Pleadings § 401 (NCI4th) — failure to plead affirmative defense of statute of limitations — pleadings deemed amended

Although neither defendants' answer nor their motion for summary judgment referred to the affirmative defense of the statute of limitations, the record reflected that the issue was clearly before the trial court by implied consent, and the pleadings were deemed amended. N.C.G.S. § 1A-1, Rule 15(b).

Am Jur 2d, Pleading §§ 308, 329, 330.

2. Estoppel § 13 (NCI4th) — damage from surface water drainage — defendants' representations — plaintiffs' reliance on representations — equitable estoppel applicable — summary judgment based on statute of limitations inappropriate

In an action for damages and injunctive relief based upon surface water and debris running off defendants' land onto plaintiffs' land, summary judgment for defendants based on the statute of limitations was inappropriate where plaintiffs asserted that defendants repeatedly promised to remedy the surface water drainage problems, that plaintiffs believed that defendants would keep their word and fix the problems, and in reliance on defendants' promises, plaintiffs delayed instituting legal action. If a jury believed plaintiffs' evidence concerning these promises, defendants' assertion of the statute of limitations in defense of the action would be wholly inconsistent with their previous representations, and the law of equitable estoppel would prevent them from relying on the statute of limitations as a bar.

Am Jur 2d, Estoppel and Waiver §§ 26-34, 81, 82.

Estoppel to rely on statute of limitations. 24 ALR2d 1413.

Appeal by plaintiffs from order entered 14 January 1992 by Judge Robert L. Farmer in Johnston County Superior Court. Heard in the Court of Appeals 12 May 1993.

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[112 N.C. App. 484 (1993)]

This is a civil action for damages and injunctive relief alleging nuisance, trespass, and violation of the Sedimentation Pollution Control Act based upon surface water and debris running off defendants' land onto plaintiffs' land. Plaintiffs Tony and Mabel Futch are the owners of a one acre lot (the "Futch property") located on the Lizzie Street Extension in the Pine Level Township, Johnston County. Plaintiffs Wade and Jonah Miller are the owners of approximately six acres (the "Miller property") adjacent to the Futch property. Plaintiffs acquired their respective lands at various times in the 1960's. In 1978, defendant Kenneth A. Talton acquired approximately 125 acres adjoining the Futch and Miller properties, and, in January 1984, conveyed a one-half interest in the tract to his son, defendant John Arthur Talton.

Plaintiffs filed their complaint and summons was issued on 13 November 1989. On 9 January 1990, prior to any responsive pleading by defendants, plaintiffs filed an amended complaint alleging that at the time they acquired their property, a three to four foot drainage ditch existed on defendants' property which ran in a north-south direction behind plaintiffs' property. The ditch extended into the woodland towards Interstate 95 and the Moccasin Creek Watershed where it emptied surface water drained from defendants' property. Plaintiffs allege that defendants subsequently closed the ditch in 1985 or 1986 by filling it in and that near that same time, defendants installed underground tile in order to drain sub-surface waters. Additionally, plaintiffs allege, in the course of developing lots along the Lizzie Street Extension in 1987 or 1988, defendants graded the land and pushed the natural ground cover and soil to the back of the lots. Plaintiffs allege that defendants' acts of filling in the drainage ditch and the development of the lots along the Lizzie Street Extension unreasonably altered and increased the natural flow of the surface water resulting in the diversion of large amounts of water and debris onto plaintiffs' property, especially during and following periods of moderate or greater rains. Plaintiffs allege that defendants' failure to provide adequate drainage has substantially interfered with plaintiffs' use, possession and enjoyment of their lands.

Defendants answered, denying the material allegations of plaintiffs' amended complaint. Subsequently, on 24 August 1990, defendants filed a motion for leave to amend their answer to include a statute of limitations defense, based on their contention that the damage to plaintiffs' land occurred more than three years prior

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[112 N.C. App. 484 (1993)]

to suit being filed. Defendants also moved for summary judgment. Although defendants' motion to amend was allowed by order dated 6 September 1990, defendants never filed an amendment to their answer to allege a statute of limitations defense. On 14 January 1992, the trial court granted defendants' motion for summary judgment and dismissed the action. Plaintiffs appealed.

Armstrong & Armstrong, P.A., by Emery D. Ashley, for plaintiff-appellants.

Lucas, Bryant & Denning, P.A., by W. Robert Denning, III, and Robert V. Lucas, for defendant-appellees.

MARTIN, Judge.

Plaintiffs' single assignment of error is directed to the entry of summary judgment dismissing their complaint. They argue first that the affirmative defense of the statute of limitations, having never been properly pleaded, was not before the trial court and could not, therefore, provide a basis for summary judgment. Secondly, they argue that even if defendants had properly asserted the statute of limitations as a defense, genuine issues of fact exist as to whether defendants are precluded by the doctrine of equitable estoppel from relying on the defense. We reject plaintiffs' first argument; however, because we find merit in their second argument, we must reverse.

The principles of law pertaining to summary judgment are well established. A party moving for summary judgment must demonstrate that there is no genuine issue of material fact and that he is entitled to judgment as a matter of law. N.C. Gen. Stat. § 1A-1, Rule 56; *Hagler v. Hagler*, 319 N.C. 287, 354 S.E.2d 228 (1987); *International Paper Co. v. Corporex Constrs., Inc.*, 96 N.C. App. 312, 385 S.E.2d 553 (1989). Summary judgment is a drastic measure which should be used with caution, *Williams v. Power & Light Co.*, 296 N.C. 400, 250 S.E.2d 255 (1979); *Kessing v. Mortgage Corp.*, 278 N.C. 523, 180 S.E.2d 823 (1971), and awarded only where the truth is quite clear. *Lee v. Shor*, 10 N.C. App. 231, 178 S.E.2d 101 (1970). All of the evidence before the court must be construed in the light most favorable to the non-moving party. The slightest doubt as to the facts entitles the non-moving party to a trial. *Ballenger v. Crowell*, 38 N.C. App. 50, 247 S.E.2d 287 (1978). Where matters involving the credibility and weight of the evidence exist, summary judgment should ordinarily be denied.

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Burrow v. Westinghouse Electric Corp., 88 N.C. App. 347, 363 S.E.2d 215, *disc. review denied*, 322 N.C. 111, 367 S.E.2d 910 (1988).

[1] Plaintiffs argue first that defendants' failure to formally amend their answer to affirmatively plead the statute of limitations constitutes a waiver of that defense. It is true that the statute of limitations is an affirmative defense required by G.S. § 1A-1, Rule 8(c) to be set forth affirmatively in a responsive pleading. However, while the failure to plead an affirmative defense ordinarily results in a waiver of the defense, the issue may still be raised by express or implied consent. *Nationwide Mut. Insur. Co. v. Edwards*, 67 N.C. App. 1, 312 S.E.2d 656 (1984), N.C. Gen. Stat. § 1A-1, Rule 15(b). Moreover, we have held that absent prejudice to plaintiff, an affirmative defense may be raised by a motion for summary judgment regardless of whether or not it was pleaded in the answer. *County of Rutherford, ex rel. Hedrick v. Whitener*, 100 N.C. App. 70, 394 S.E.2d 263 (1990). The affirmative defense relied upon should be referred to in the motion for summary judgment; however, in the absence of an expressed reference, if the affirmative defense was clearly before the trial court, the failure to expressly mention the defense in the motion will not bar the trial court from granting the motion on that ground. *Id.* This is especially true where the party opposing the motion has not been surprised and has had full opportunity to argue and present evidence. *Dickens v. Puryear*, 302 N.C. 437, 276 S.E.2d 325 (1981). "Thus, although it is better practice to require a formal amendment to the pleadings, unpleaded defenses, when raised by the evidence, should be considered in resolving a motion for summary judgment." *Ridings v. Ridings*, 55 N.C. App. 630, 632, 286 S.E.2d 614, 615-16, *disc. review denied*, 305 N.C. 586, 292 S.E.2d 571 (1982).

Although neither defendants' answer nor their motion for summary judgment referred to the affirmative defense of the statute of limitations, the record reflects that the issue was clearly before the trial court. In the order granting defendants leave to amend their answer, entered more than a year before summary judgment was granted, the court ordered that "defendants' Answer be amended to plead the defense of Statute of Limitations in bar to the trial of this cause." Plaintiffs were not surprised by the limitations defense and made no argument that they were prejudiced. The various depositions and affidavits offered in support of, and in opposition to, defendants' motion indicate that the limitations issue was before the court. Plaintiffs' affidavits also raised the issue

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of equitable estoppel indicating that they perceived that a limitations defense was before the court. Thus, the statute of limitations was before the court by implied consent, and the pleadings are deemed amended.

[2] Plaintiffs argue next that the doctrine of equitable estoppel raises genuine issues of material fact as to whether defendants should be permitted to rely upon a statute of limitations defense. We agree.

The doctrine of equitable estoppel may be invoked to bar a defendant from relying upon the statute of limitations. *Duke University v. Stainback*, 320 N.C. 337, 357 S.E.2d 690 (1987). Equitable estoppel arises when an individual by his acts, representations, admissions or silence, when he has a duty to speak, intentionally or through culpable negligence, induces another to believe that certain facts exist and that other person rightfully relies on those facts to his detriment. *Carter v. Frank Shelton, Inc.*, 62 N.C. App. 378, 303 S.E.2d 184 (1983), *disc. review denied*, 310 N.C. 476, 312 S.E.2d 883 (1984). Neither fraud, intentional or unintentional, bad faith nor an intent to deceive are necessary to invoke the doctrine of equitable estoppel to prevent a defendant from relying on the statute of limitations. *Hensell v. Winslow*, 106 N.C. App. 285, 416 S.E.2d 426, *disc. review denied*, 332 N.C. 344, 421 S.E.2d 148 (1992); *Duke, supra*. When estoppel is based upon an affirmative representation and an inconsistent position subsequently taken, it is not necessary that the party to be estopped have any intent to mislead or deceive the party claiming the estoppel, or that the party to be estopped even be aware of the falsity of the representation when it was made. *Meacham v. Board of Educ.*, 59 N.C. App. 381, 297 S.E.2d 192 (1982), *disc. review denied*, 307 N.C. 577, 299 S.E.2d 651 (1983). Estoppel principles depend on the facts of each case. *Mayer v. Mayer*, 66 N.C. App. 522, 311 S.E.2d 659, *disc. review denied*, 311 N.C. 760, 321 S.E.2d 140 (1984). In determining whether the doctrine applies, the conduct of both parties must be weighed in the balances of equity. *Peek v. Trust Co.*, 242 N.C. 1, 86 S.E.2d 745 (1955). If the evidence in a particular case raises a permissible inference that the elements of equitable estoppel are present, but other inferences may be drawn from contrary evidence, estoppel is a question of fact for the jury. *Meacham v. Board of Educ.*, 47 N.C. App. 271, 267 S.E.2d 349 (1980), *appeal after remand*, 59 N.C. App. 381, 297 S.E.2d 192 (1982), *disc. review denied*, 307 N.C. 577, 299 S.E.2d 651 (1983).

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In their deposition testimony and in their affidavits offered in opposition to defendants' motion for summary judgment, plaintiffs asserted that defendants repeatedly promised to remedy the surface water drainage problems, that plaintiffs believed that defendants would keep their word and fix the problems, and in reliance on defendants' promises, plaintiffs delayed instituting legal action. If a jury were to believe the plaintiffs' evidence concerning these promises, defendants' assertion of the statute of limitations in defense of the action would be wholly inconsistent with their previous representations, and the law of equitable estoppel would prevent them from relying on the statute of limitations as a bar. *See Parker v. Thompson-Arthur Paving Co.*, 100 N.C. App. 367, 396 S.E.2d 626 (1990). Additionally, the parties presented conflicting evidence, creating an issue of fact, as to when the actions complained of began to occur, and consequently, when the statute of limitations began to run. Therefore, summary judgment based on the statute of limitations is not appropriate. *Snyder v. Freeman*, 300 N.C. 204, 266 S.E.2d 593 (1980).

Reversed.

Chief Judge ARNOLD and Judge ORR concur.

RAY B. MEACHUM AND WIFE, JOYCE B. MEACHUM, Co-EXECUTORS OF THE
ESTATE OF LEE ANN MEACHUM v. BRANFORD SIMPSON FAW

No. 9220SC1080

(Filed 2 November 1993)

**Automobiles and Other Vehicles § 440 (NCI4th)— negligent
entrustment—action by bailee against bailor—action barred
by bailee's contributory negligence**

A bailee may bring an action for negligent entrustment against the bailor, but such action is subject to the defense of contributory negligence. In this case, the unlicensed sixteen-year-old decedent's own negligence in driving while voluntarily intoxicated rose to the level of defendant's negligence in en-

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trusting the automobile to her, and plaintiffs' claim was therefore barred by decedent's contributory negligence.

Am Jur 2d, Automobiles and Highway Traffic §§ 643-646.

Appeal by plaintiffs from order entered 20 August 1992 by Judge William H. Helms in Anson County Superior Court. Heard in the Court of Appeals 30 September 1993.

Plaintiffs brought this action against defendant alleging that he negligently allowed plaintiffs' 16-year-old daughter, whom he knew to be an unlicensed and incompetent driver, to drive his car after she had consumed substantial amounts of mind-altering substances and further alleging that, as a result of her intoxication and incompetence, the daughter drove defendant's car recklessly and at a high rate of speed, eventually driving the car off the highway and having a wreck resulting in her death. Defendant filed a motion to dismiss, pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) (1990), for failure to state a claim upon which relief can be granted. The trial court entered an order granting defendant's motion to dismiss, and from this order, plaintiffs appeal.

F. O'Neil Jones for plaintiffs-appellants.

Caudle & Spears, P.A., by Harold C. Spears and Timothy T. Leach, for defendant-appellee.

MCCRODDEN, Judge.

Plaintiffs' sole argument on appeal is that the trial court erred in dismissing their complaint because it stated a claim for relief, to wit: negligent entrustment. For the reasons stated below, we reject this argument and affirm the order of the trial court.

In their complaint plaintiffs alleged that early in the morning of 31 December 1989, their decedent, Lee Ann Meachum, was driving defendant's car under the express authority of defendant. The complaint also averred that:

[The decedent] was an unlicensed motor vehicle operator and that she was 16 years of age, and that she was inexperienced in the operation of motor vehicles; and further that on December 31, 1989, [decedent] had a known proclivity for impulsive conduct, and had an addiction to mind altering substances; and that on the night of December 31, 1989, [decedent] had con-

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sumed a substantial amount of intoxicating substances in the presence of and at the bequest [sic] of [defendant]; and at the time alleged hereinabove, [decedent] was under the influence of some mind altering substances, and that [defendant] was aware of all of the above conditions and that [defendant] knew or by the exercise of reasonable care, should have known, that the driver was incompetent, inexperienced, or reckless in the operation of the motor vehicle; and in spite of this, permitted [decedent], an unlicensed driver, to operate a motor vehicle while under the influence of some mind altering substance and at a high rate of speed as above alleged.

5. That [defendant] negligently entrusted said automobile to [decedent] knowing at the time she was unlicensed; knowing at the time that she was intoxicated; knowing that she had a history of impulsive and erratic behavior; and knowing that she had a tendency to drive the automobile at a high rate of speed; and that her inexperienced operation of a motor vehicle would likely cause the motor vehicle to wreck and to harm herself or others; and, in spite of this knowledge, he did entrust said automobile to [decedent]; and that she thereafter did drive the automobile in a reckless and negligent fashion, and that as a direct result of her reckless, negligent, incompetent and inexperienced operation of the motor vehicle, there was a wreck, at the time and place of above alleged, and that as a result of the wreck [decedent] died.

A motion to dismiss tests the legal sufficiency of the complaint. *Sutton v. Duke*, 277 N.C. 94, 176 S.E.2d 161 (1970). A decedent's estate may bring an action for wrongful death only to recover such damages as the decedent could have recovered had he lived. N.C. Gen. Stat. § 28A-18-2 (Supp. 1992); *Sorrells v. M.Y.B. Hospitality Ventures of Asheville*, 332 N.C. 645, 647, 423 S.E.2d 72, 73 (1992). Therefore, we must determine whether, under the allegations of the complaint, decedent could have maintained a negligence action against defendant had she lived. *Id.*

Generally, one who entrusts a vehicle to a person who the bailor knows or, in the exercise of ordinary care, should know is intoxicated (or likely to become so), incompetent or reckless and is likely to cause injury may be liable for damages resulting from the bailee's negligent use of the vehicle. *McIlroy v. Akers Motor Lines*, 229 N.C. 509, 514, 50 S.E.2d 530, 533 (1948). The

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cause of action rests on the independent culpable negligence of the bailor in entrusting the automobile to a person whom he knew or should have known was likely to cause injury. *Roberts v. Hill*, 240 N.C. 373, 378, 82 S.E.2d 373, 378 (1954). The negligence of the bailee merely furnishes the causal link between the primary negligence of the bailor and the injury or damage. *Id.*

Defendant asserts that decedent would not have been entitled to bring this action because a negligent entrustment action may only be brought by a third party, not the bailee. While it is true that a number of North Carolina cases have stated that one of the necessary elements of negligent entrustment is injury to a third party, *see, e.g., Hutchens v. Hankins*, 63 N.C. App. 1, 303 S.E.2d 584, *disc. review denied*, 309 N.C. 191, 305 S.E.2d 734 (1983), *Roberts v. Hill*, 240 N.C. 373, 82 S.E.2d 373, *McIlroy v. Akers Motor Lines*, 229 N.C. 509, 50 S.E.2d 530, no North Carolina case has directly faced the issue of whether a negligent bailee may recover against a bailor for negligent entrustment, nor has one held that only a third party may recover under the theory of negligent entrustment. The case of *Osborne v. Gilreath*, 241 N.C. 685, 86 S.E.2d 462 (1955), although not directly addressing the question, leaves open the possibility that one who is not a third party might recover under the negligent entrustment theory. In *Osborne*, the plaintiff alleged that the defendant's negligence in driving his vehicle or allowing someone to drive his vehicle had caused the death of the plaintiff's intestate. Our Supreme Court found that, while there was a dispute about who had been operating the vehicle, there was evidence tending to show that the plaintiff's intestate had been driving at the time of the accident, and, since the plaintiff's complaint alleged no negligence on the part of the intestate or any other potential driver, the plaintiff was not entitled to rely on the theory of negligent entrustment. *Osborne*, 241 N.C. at 688, 86 S.E.2d at 464. The Court affirmed the trial court's dismissal of the plaintiff's action.

Cases from other jurisdictions offer valuable insight. *See, e.g., Casebolt v. Cowan*, 829 P.2d 352 (Colo. 1992); *Gorday v. Faris*, 523 So.2d 1215 (Fla. App. 1988); *Blake v. Moore*, 208 Cal. Rptr. 703 (1984); and *Keller v. Kiedinger*, 389 So.2d 129 (Ala. 1980). Of these, *Keller v. Kiedinger* is particularly instructive. In that case, the defendant, an 18-year-old boy, allowed the decedent, a 14-year-old girl, to drive his aunt's car. While driving, the decedent lost control of the vehicle and crashed into a pond where she drowned.

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The defendant in *Keller* argued, as defendant does here, that a bailee injured by her own negligence may not bring suit against the bailor. The Alabama Supreme Court found that the essence of a claim for negligent entrustment was the primary negligence of the bailor in entrusting the chattel to the incompetent bailee, not the bailee's negligence. *Keller*, 389 So.2d at 132. Thus, the bailee's negligence was not an essential element of the claim against the bailor and the claim was not barred *per se* by the doctrine of contributory negligence. *Id.* The *Keller* court, like each of the other courts that have allowed a negligent entrustment claim to be brought by a negligent bailee, adopted the view of the Second Restatement of Torts.

Section 390 of the Restatement provides:

One who supplies directly or through a third person a chattel for the use of another whom the supplier knows or has reason to know to be likely because of his youth, inexperience, or otherwise, to use it in a manner involving unreasonable risk of physical harm to *himself and others* whom the supplier should expect to share in or be endangered by its use, is subject to liability for physical harm resulting to them.

Restatement (Second) of Torts § 390 (1965) (emphasis added). The *Keller* court also relied upon the commentary to Section 390 to find that contributory negligence was a defense to an action for negligent entrustment:

As always this phrase denotes that a supplier is liable if, but only if, his conduct is the legal cause of the bodily harm complained of and if the person suffering the harm is not subject to any defense such as contributory negligence, which will prevent him from recovering damages therefor. One who accepts and uses a chattel knowing that he is incompetent to use it safely . . . or one who is himself careless in the use of the chattel after receiving it, is usually in such contributory fault as to bar recovery. . . . [However] if the supplier knows that the condition of the person to whom the chattel is supplied is such as to make him incapable of exercising the care which it is reasonable to expect of a normal sober adult, the supplier may be liable for harm sustained by the incompetent although such person deals with it in a way which may render him liable to third persons who are also injured.

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Restatement (Second) of Torts § 390 cmt. c (1965). The *Keller* court found that the decedent was contributorily negligent as a matter of law and that, in the absence of any evidence that defendant had wantonly entrusted the car to the decedent, the plaintiff's action was barred. 389 So.2d at 133.

Like the Alabama Supreme Court, we find the view presented in the Restatement compelling and adopt it as our own. Thus, we hold that a bailee may bring an action for negligent entrustment against the bailor but that such an action is subject to the defense of contributory negligence.

In this case, plaintiffs alleged in their complaint that the decedent "drove the automobile in a reckless manner and at a high and unlawful rate of speed, and without maintaining a proper control and proper lookout. . . ." Plaintiffs admitted on the face of their complaint that the decedent was contributorily negligent. They argue, however, that such contributory negligence should not be a bar to their action because the defendant's actions were wanton and willful.

While it is true that ordinary contributory negligence is no defense to an action based on wanton and willful conduct, *Robinson v. Seaboard System Railroad*, 87 N.C. App. 512, 519, 361 S.E.2d 909, 914 (1987), *disc. review denied*, 321 N.C. 474, 364 S.E.2d 924 (1988), we reject plaintiffs' argument on the basis of a similar case decided by our Supreme Court. In *Sorrells v. M.Y.B. Hospitality Ventures of Asheville*, the estate of 21-year-old man who had been killed as a result of driving while extremely intoxicated brought an action against the seller of the alcohol. Although the Court recognized that ordinary contributory negligence is not a defense to an action for willful and wanton negligence, it held that the plaintiff's claim was barred because the decedent's contributory negligence rose at least to the level of the defendant's fault. *Sorrells*, 332 N.C. at 649, 423 S.E.2d at 74.

Plaintiffs allege in their complaint that decedent had consumed mind-altering substances and was under the influence of such substances when she wrecked the car. This admission is fatal to plaintiffs' claim. At the time of her death, decedent was 16 years old. There is a rebuttable presumption that a person at that age, indeed at the age of 14, possesses the capacity of an adult to protect himself and is, therefore, chargeable with the same standard of care for his own safety as if he were an adult. *Welch v. Jenkins*,

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271 N.C. 138, 144, 155 S.E.2d 763, 768 (1967). Hence, decedent presumptively had the capacity to be contributorily negligent. *Id.* at 142, 155 S.E.2d at 767. At her age, the decedent also presumptively had the capacity to commit a crime, *State v. Rogers*, 275 N.C. 411, 424, 168 S.E.2d 345, 353 (1969), *cert. denied*, 396 U.S. 1024, 24 L.Ed.2d 518 (1970), *e.g.*, possessing and consuming alcohol. N.C. Gen. Stat. § 18B-302(b) (1989).

Nothing in the allegations of the complaint rebuts these presumptions as to plaintiffs' decedent. Although the complaint does allege that decedent consumed the mind-altering substances "in the presence of and at the bequest [*sic*] of the defendant", there is no allegation that the decedent's consumption and subsequent intoxication were involuntary. We believe that, as in *Sorrells*, the decedent's own negligence in driving while voluntarily intoxicated rose to the level of the defendant's negligence in entrusting the automobile to her. Therefore, we find that, as a matter of law, the plaintiffs' claim is barred by decedent's contributory negligence as alleged in the complaint. Hence, plaintiffs' complaint failed to state a claim upon which relief might be granted, and the trial court properly dismissed the action. We affirm its order.

Affirmed.

Judges JOHNSON and COZORT concur.

NATIONAL FRUIT PRODUCT COMPANY, INC. v. BETSY Y. JUSTUS,
SECRETARY OF THE NORTH CAROLINA DEPARTMENT OF REVENUE

No. 9227SC1010

(Filed 2 November 1993)

1. Appeal and Error § 210 (NCI4th)— certificate of service missing—acknowledgement of proper service—treated as petition for writ of certiorari

An attempted appeal was treated as a petition for certiorari where the record on appeal did not contain a certificate showing service of defendant's notice of appeal from the trial

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court, but plaintiff acknowledged at oral argument that defendant properly served it with notice of appeal.

Am Jur 2d, Appeal and Error § 320 et seq.**2. Taxation § 19.1 (NCI3d)— excise tax—fruit juice exemption—registration**

The trial court erroneously determined that plaintiff's private label apple juice products do not require separate registration to be exempt from the excise tax on soft drinks under N.C.G.S. § 105-113.47. Although plaintiff contends that all of the apple juice it produces is fungible, is the same drink, and thus need not be registered separately when sold under different labels, this assertion assumes that the Secretary is aware of all of plaintiff's apple juice products, regardless of their brand names, is aware of plaintiff's expected exemptions, and has periodically analyzed them for compliance with the law. Absent registration, with or without an affidavit, the Secretary would have no notice of the claimed exemption and would be unable to perform analyses necessary to verify exemption or prove non-exemption.

Am Jur 2d, State and Local Taxation §§ 338, 358.**3. Taxation § 19.1 (NCI3d)— soft-drink tax—fruit juice exemption—failure to register**

The court erred in ordering a refund of excise taxes plaintiff had paid on its vitamin C fortified apple juice products, sold under different product and brand names, because these are separate drinks and must be registered separately to qualify for the juice exemption to the soft-drink excise tax under N.C.G.S. § 105-113.47. Although plaintiff argues that the fact that N.C.G.S. § 105-113.47(a) states that vitamins are not to be considered artificial ingredients indicates that vitamins are to be considered an integral part of the juice, and thus vitamin-added fruit juice is indistinguishable from non-fortified juice and need not be separately registered, the obvious purpose of this provision is to keep otherwise exempt fruit or vegetable juice from being considered non-exempt solely because it contains sugar, salt or vitamins.

Am Jur 2d, State and Local Taxation §§ 338, 358.

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4. Taxation § 19.1 (NCI3d)— soft-drink excise tax—juice exemption—not retroactive

Plaintiff was not entitled to a refund of excise taxes paid prior to registration of an apple juice brand as exempt. The language of N.C.G.S. § 105-113.47(b) is clear and unambiguous; until a drink is registered, it is taxable. To accept plaintiff's contention would be to allow a manufacturer to sell a soft drink, subsequently apply for an exemption for the drink in its then existing form, earn an exemption and have that exemption apply to sales of soft drinks which the Secretary was unable to analyze because an exemption had not yet been claimed.

Am Jur 2d, State and Local Taxation §§ 338, 358.

On writ of certiorari to review the judgment entered 22 June 1992 by Judge Janet Marlene Hyatt in Lincoln County Superior Court. Heard in the Court of Appeals 16 September 1993.

In November 1987, after conducting a soft drink excise tax audit of plaintiff, defendant issued a notice of proposed assessment for a deficiency in excise taxes for the period from 1 January 1982 through 30 November 1987. Defendant alleged that plaintiff was not entitled to exemptions for the brands of apple juice that it had not specifically registered pursuant to N.C. Gen. Stat. § 105-113.47 (1985). Plaintiff appealed to the Department of Revenue, which upheld the assessment for the deficiency, and then to the Tax Review Board, which affirmed the decision of the Department of Revenue on 18 April 1990.

After paying the assessment under protest, plaintiff brought this action in the Lincoln County Superior Court, seeking a refund of the assessment it had paid. Both plaintiff and defendant filed motions for summary judgment. In an order entered 22 June 1992, the trial court denied defendant's motion and entered summary judgment in favor of plaintiff. From this order, defendant appeals.

Petree Stockton, by J. Robert Elster, Timothy J. Ehlinger and Henry C. Roemer, III, for plaintiff-appellee.

Attorney General Lacy H. Thornburg, by Special Deputy Attorney General George W. Boylan, for defendant-appellant.

NATIONAL FRUIT PRODUCT CO. v. JUSTUS

[112 N.C. App. 495 (1993)]

McCRODDEN, Judge.

[1] The record on appeal in this case contains no certificate showing service of defendant's notice of appeal from the trial court. In *Hale v. Afro-American Arts International*, 110 N.C. App. 621, 430 S.E.2d 457 (1993), a panel of this Court held that when the record on appeal does not contain the certificate showing service of the notice of appeal, as required by N.C.R. App. P. 26(d), this Court obtains no jurisdiction over the appeal. At oral argument in this case, however, plaintiff's counsel acknowledged that defendant properly served it with the notice of appeal. We elect, therefore, to treat the attempted appeal in this case as a petition for writ of certiorari, which we grant.

[2] The primary issue we confront is whether plaintiff, a large producer of fruit juice products, is entitled to a "fruit juice" exemption under N.C.G.S. § 105-113.47 for juices sold under labels and brand names, including private label juice products, different from the one (White House Apple Juice) which it had registered for exemption.

The North Carolina legislature, through N.C. Gen. Stat. § 105-113.45 (1985), elected to subject all soft drinks, including fruit juices, to an excise tax. It also, however, elected to exempt some soft drinks from this tax. At all times relevant to this appeal, the applicable statute pertaining to exemptions provided:

(a) All bottled soft drinks containing thirty-five percent (35%) or more of natural fruit or vegetable juice . . . are exempt from the excise tax imposed by this Article, except that this exemption shall not apply to any fruit or vegetable juice drink to which has been added any coloring, artificial flavoring or preservative. Sugar, salt or vitamins shall not be construed to be an artificial flavor or preservative.

(b) Any bottled soft drink for which exemption is claimed under this section must be registered with the Secretary. *No bottled soft drink shall be entitled to the exemption until registration has been accomplished* by the filing of an application for exemption on such form as may be prescribed by the Secretary, which form shall include an affidavit setting forth the complete and itemized formula by volume of the drink therein referred to, and the failure to submit such affidavit shall be prima facie evidence that such bottled soft drink is not exempt.

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... [T]he Secretary or his duly authorized representative may at any time take samples of any product for which exemption has been claimed ... for the purpose of ascertaining by analysis the contents thereof.

N.C.G.S. § 105-113.47 (emphasis added).

Defendant presents three arguments on appeal based upon three assignments of error. First, she argues that the trial court erred in ordering a refund of the taxes paid on the private label drinks because they had not been separately registered. In essence, defendant argues that each of plaintiff's private label products is a distinct soft drink that had to be individually registered, and, failing that, should have been subjected to the excise tax. We agree.

The statute is clear that no exemption may be obtained for a fruit juice "until registration has been accomplished" While the Secretary of the Department of Revenue (Secretary) may prescribe the form of such registration, the legislature mandates the inclusion of an affidavit setting forth the formula of the drink. One purpose of the registration, at least by implication, is that it puts the Secretary on notice that the exemption is being claimed, allowing her or her authorized representative to take samples of the drink at any time to verify its composition.

The Secretary's registration form, not at issue here, has one blank for the brand name of the product and a number of blanks for the ingredients by volume. The form which plaintiff completed in 1969, and by which it seeks exemptions for all its apple juice products, listed the brand name as "White House," and the ingredients as "Apple Juice." Significantly, plaintiff also filed registration forms in May 1980 for "12/46 oz. White House Apple Juice," "12/32 oz. Town House Apple Juice," and "12/46 oz. Town House Apple Juice."

Plaintiff asserts that all of the apple juice it produces is fungible, is the same drink, and thus need not be registered separately when sold under different labels. This assertion, however, assumes that the Secretary is aware of all of plaintiff's apple juice products, regardless of their brand names, is aware of plaintiff's expected exemptions, and has periodically analyzed them for compliance with the law. This is an assumption we are unwilling to accept. Moreover, plaintiff's registration of several brand names in 1969 and 1980

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belies its insistence that the statute requires only one registration of its product, regardless of brand name.

Plaintiff also contends that, under the statute, the failure to register a juice constitutes only *prima facie* evidence of non-exemption and that producers of such juices may, therefore, rebut this evidence. Plaintiff, however, misreads the statute. The statute states that failure to submit an *affidavit* shall be *prima facie* evidence that the drink is not exempt. The affidavit is only one part of the registration, and “[n]o bottled soft drink shall be entitled to the exemption until registration has been accomplished” Absent registration, with or without an affidavit, the Secretary would have no notice of the claimed exemption and would be unable to perform analyses necessary to verify exemption or prove non-exemption. Accordingly, we hold that the trial court erroneously determined that plaintiff’s private label apple juice products do not require separate registration.

[3] For the foregoing reasons, we also conclude that the trial court erred in ordering a refund of the taxes plaintiff paid on its vitamin C fortified apple juice products, sold under different product and brand names. These too are separate drinks and must be registered separately.

Plaintiff asserts that the fact that Section 105-113.47(a) states that vitamins are not to be considered artificial ingredients indicates that vitamins are to be considered an integral part of the juice, and thus vitamin-added fruit juice is indistinguishable from non-fortified juice and need not be separately registered. The obvious purpose of this provision is to keep otherwise exempt fruit or vegetable juice from being considered non-exempt solely because it contains sugar, salt or vitamins. We hold that plaintiff’s vitamin C-added juices sold under different product names must also be separately registered.

[4] Finally, we reject the trial court’s determination that an exemption under the statute operates retroactively.

On 9 October 1987, within the audit period, plaintiff registered Harris Teeter brand “No Sugar Added Apple Juice” with defendant. Subsequently, defendant assessed plaintiff for excise taxes on drinks which plaintiff had sold prior to their registration, including Harris Teeter No Sugar Added Apple Juice. However,

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the trial court ordered a refund of all excise taxes paid on this drink, including taxes paid prior to its registration.

The language of the statute is clear and unambiguous; “[n]o bottled soft drink shall be entitled to the exemption *until registration has been accomplished . . .*” N.C.G.S. § 105-113.47(b) (emphasis added). Quite simply, this means that until a drink is registered, it is taxable.

Throughout its brief, plaintiff has relied upon the case of *Food House, Inc. v. Coble, Sec. of Revenue*, 289 N.C. 123, 221 S.E.2d 297 (1976), a case in which the North Carolina Supreme Court considered the application of the statute at issue here. The Court stated that the sale of bottled fruit juice was not a taxable event. *Id.* at 136, 221 S.E.2d at 306. Although this dictum would seem to imply that the sale of fruit juice is not taxable *ab initio*, we believe that *Food House* is distinguishable from the case at hand. In *Food House*, the issue the Court faced was whether frozen concentrated orange juice could be exempted at all. In reaching its conclusion that frozen concentrated orange juice was exempt, the Court never addressed subsection (b) of N.C.G.S. § 105-113.47, dealing with registration. We find that the statement in *Food House* to the effect that sales of fruit juice are not taxable events does not control our decision today.

Section 105-113.47(b) is unequivocal in its terms. “If the language of a statute is clear and unambiguous, judicial construction is unnecessary and its plain and definite meaning controls.” *Food House*, 289 N.C. at 134-35, 221 S.E.2d at 304. In this instance the plain meaning of the statute is that a producer of allegedly exempt fruit juices is not entitled to the exemption *until* it registers its products. The absolute language of the statute demonstrates the intention of the General Assembly to encourage soft drink manufacturers to register for exemptions contemporaneously with the first sale of such allegedly exempt drinks. This intention is further borne out by the fact that the Secretary has the responsibility to analyze the contents of soft drinks for which exemption has been sought, N.C.G.S. § 105-113.47(b), and, absent registration, cannot fulfill this responsibility. To accept plaintiff’s contention would be to allow a manufacturer to sell a soft drink, subsequently apply for an exemption for the drink in its then existing form, earn an exemption and have that exemption apply to sales of soft drinks which the Secretary was unable to analyze because an exemption had not

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yet been claimed. This we refuse to do. We hold that plaintiff was not entitled to a refund of excise taxes paid prior to the registration for exemption.

In summary, we conclude that plaintiff must separately register its private label drinks and its vitamin C-added fruit juices with defendant and that plaintiff is not entitled to a refund as to that portion of excise taxes paid for the period prior to such registration. We reverse the judgment of the trial court and remand for entry of judgment, consistent with this opinion, for defendant.

Reversed and remanded.

Judges JOHNSON and COZORT concur.

GABRIELLA MURRAY HIEB AND ROBERT NELSON HIEB, PLAINTIFFS v.
ST. PAUL FIRE AND MARINE INSURANCE COMPANY AND HARTFORD
ACCIDENT AND INDEMNITY COMPANY, DEFENDANTS

No. 9226SC1122

(Filed 2 November 1993)

1. Insurance § 530 (NC14th) — UIM coverage — no reduction allowed for amount of workers' compensation benefits

Defendant Hartford Insurance Company was not entitled to reduce its \$500,000 limit in UIM coverage by the workers' compensation benefits paid or to be paid to plaintiff by defendant St. Paul Insurance Company, since the UIM insurance and the workers' compensation insurance were provided by separate and unaffiliated companies; plaintiff was, in effect, the alter ego of North Carolina Let's Play to Grow which purchased the UIM coverage, thus making the Hartford policy more closely resemble a personal automobile liability insurance policy rather than a business insurance policy, as it was denominated; and plaintiff received a judgment in an amount in excess of the policy limits provided by Hartford.

Am Jur 2d, Automobile Insurance § 293 et seq.

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[112 N.C. App. 502 (1993)]

2. Insurance § 530 (NCI4th)— workers' compensation carrier— entitlement to lien against funds paid by UIM carrier

Defendant St. Paul Insurance Company was entitled to a workers' compensation lien against all amounts paid or to be paid to plaintiff by defendant Hartford Insurance Company pursuant to its UIM coverage.

Am Jur 2d, Automobile Insurance § 293 et seq.

Appeal by plaintiffs from an order entered 28 August 1992 in Mecklenburg County Superior Court by Judge Robert P. Johnston granting summary judgment in favor of defendants. Heard in the Court of Appeals 6 October 1993.

On 17 October 1989, plaintiff, Gabriella Murray Hieb, while driving to New Bern, North Carolina in the course and scope of her employment with Howell's Child Care Center, suffered personal injuries as a result of a collision with a vehicle driven by Woodrow Lowery (Lowery). Mrs. Hieb has received workers' compensation benefits from defendant St. Paul and Marine Insurance Company (St. Paul), the workers' compensation insurance carrier for Howell's Child Care Center.

The vehicle driven by Mrs. Hieb was owned by a nonprofit corporation, North Carolina Let's Play to Grow, and insured by defendant Hartford Accident and Indemnity Company (Hartford) with liability and underinsured/uninsured motorist (UIM) coverage in the amount of \$500,000.

The vehicle driven by Lowery was insured by Integon Indemnity Company (Integon) with liability coverage limits of \$25,000 per person and \$50,000 per accident. Integon has tendered its policy limits of \$25,000 to plaintiff. Mrs. Hieb filed suit against Lowery, and a jury returned a verdict in her favor in the amount of \$1,279,000. Mrs. Hieb and St. Paul agreed that the \$25,000 tendered by Integon will be applied to St. Paul's workers' compensation lien authorized by N.C. Gen. Stat. § 97-10.2.

Plaintiffs then filed this suit seeking a declaratory judgment as to the rights of Mrs. Hieb to the proceeds from the UIM policy issued by defendant Hartford. On 28 August 1992, the trial court granted summary judgment in favor of defendants. Plaintiffs appealed.

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Monnett, Berry & Roberts, by Charles G. Monnett III, for plaintiffs-appellants.

Dean & Gibson, by Rodney Dean, for defendant-appellee St. Paul Fire and Marine Insurance Company.

Hedrick, Eatman, Gardner & Kincheloe, by Edward L. Eatman, Jr., John F. Morris, and Kent C. Ford, for defendant-appellee Hartford Accident and Indemnity Company.

WELLS, Judge.

Plaintiffs contend that the trial court erred in granting summary judgment in favor of defendant Hartford permitting Hartford to reduce the limits of its UIM coverage by any amounts paid or to be paid to Mrs. Hieb or on her behalf by St. Paul as workers' compensation benefits. We agree.

When a motion for summary judgment is granted, the questions for determination on appeal are whether, on the basis of the materials presented at trial, there is a genuine issue as to any material fact and whether the movant is entitled to judgment as a matter of law. *Smith v. Smith*, 65 N.C. App. 139, 308 S.E.2d 504 (1983).

In *Manning v. Fletcher*, 324 N.C. 513, 379 S.E.2d 854, *reh'g denied*, 325 N.C. 277, 384 S.E.2d 517 (1989), the plaintiff's employer purchased a business auto insurance policy, which provided UIM coverage, from North Carolina Farm Bureau Mutual Insurance Company. Plaintiff's employer also purchased workers' compensation insurance from North Carolina Farm Bureau Mutual Insurance Company. The insurance policy in *Manning* provided: "Any amount payable under the insurance policy would be reduced by: a. All sums paid or payable under any workers' compensation, disability benefits or similar law exclusive of non-occupational disability benefits." *Manning, supra*. Our Supreme Court held that N.C. Gen. Stat. § 20-279.21(e) permits an insurance carrier to reduce the UIM coverage liability in a business auto insurance policy by amounts paid to the insured as workers' compensation benefits. *Accord Brantley v. Starling*, 111 N.C. App. 669, 433 S.E.2d 1 (1993).

In *Ohio Casualty Group v. Owens*, 99 N.C. App. 131, 392 S.E.2d 647, *rev. denied*, 327 N.C. 484, 396 S.E.2d 614 (1990), defendant was injured in an automobile accident during the course and scope of her employment. Defendant's employer purchased workers' com-

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pensation insurance from Amerisure Insurance Companies. Defendant purchased automobile liability insurance, which included UIM coverage to a maximum of \$50,000, from plaintiff. Defendant received \$20,392.70 in workers' compensation insurance and \$25,000 from the tortfeasor's liability insurer. Plaintiff argued that it was entitled to reduce its \$50,000 limit in UIM coverage by the \$20,392.70 in workers' compensation benefits. This Court held that plaintiff was not entitled to reduce its UIM coverage by the workers' compensation benefits paid to defendant. We distinguished *Manning* based on the fact that defendant, not her employer, purchased the UIM coverage. We concluded that defendant would not recover twice because she purchased her own UIM coverage and because Amerisure was entitled to a lien on the insurance proceeds provided by plaintiff under the UIM coverage for \$20,392.70.

In *Sproles v. Greene*, 100 N.C. App. 96, 394 S.E.2d 691 (1990), *aff'd in part and rev'd in part*, 329 N.C. 603, 407 S.E.2d 497 (1991), this Court refused to allow the UIM insurer to reduce the limits of its coverage by the workers' compensation payments received by plaintiff. In *Sproles*, Mrs. Sproles was injured in an automobile accident during the course and scope of her employment. Mrs. Sproles obtained and paid for UIM coverage from United States Fidelity and Guaranty Company. The workers' compensation insurance, provided by Mrs. Sproles' employer, was issued by Aetna Casualty & Surety Company. This Court distinguished *Manning* based on the following facts: (1) the UIM insurance policy was not a "Business Auto Policy" but a "Personal Auto Policy;" (2) the workers' compensation insurance was not provided by the UIM insurer or its affiliate; and (3) Mrs. Sproles' damages exceeded the available insurance.

The forecast of evidence in the case *sub judice* discloses that the automobile driven by Mrs. Hieb at the time of the collision was owned by North Carolina Let's Play to Grow, a nonprofit corporation founded by Mrs. Hieb with a grant from the Joseph P. Kennedy, Jr. Foundation. Mrs. Hieb was the Executive Director of North Carolina Let's Play to Grow and was its only employee. She received no compensation for her work at North Carolina Let's Play to Grow. Mrs. Hieb was also employed as Director of Public Affairs and Community Resources at Howell's Child Care Center, earning approximately \$28,000 per year. North Carolina Let's Play to Grow is unaffiliated with Howell's Child Care Center. St. Paul is the workers' compensation insurer for Howell's Child Care Center.

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The named insured of the insurance policy issued by Hartford, the UIM insurer, is North Carolina Let's Play to Grow. In her affidavit, Mrs. Hieb stated that the insurance premiums on the Hartford policy were paid from contributions, a grant from the Kennedy Foundation, and, when the contributions and grants were insufficient, by her personally. The insurance policy is denominated a "Business Auto Policy" and provides: "Any amount payable under this coverage shall be reduced by: a. All sums paid or payable under any workers' compensation, disability benefits or similar law exclusive of non-occupational disability benefits." Mrs. Hieb received a judgment against Lowery, whose liability coverage was only \$25,000, for \$1,279,000. The Hartford policy provided UIM coverage for Mrs. Hieb in the amount of \$500,000.

[1] We find *Owens* and *Sproles* to be the controlling law in this case and hold that Hartford is not entitled to reduce its \$500,000 limit in UIM coverage by the workers' compensation benefits paid or to be paid to Mrs. Hieb by St. Paul. *Owens* and *Sproles*, and not *Manning*, are controlling because: (1) the UIM insurance and the workers' compensation insurance were provided by separate and unaffiliated companies; (2) Mrs. Hieb was, in effect, the alter ego of North Carolina Let's Play to Grow, which makes the insurance policy provided by Hartford resemble more closely the policies in *Owens* and *Sproles*, although the policy in this case was denominated a "Business Insurance Policy;" and (3) Mrs. Hieb has received a judgment in an amount in excess of the policy limits provided by Hartford. The public policies inherent in § 20-279.21(e) support our holding. First, since North Carolina Let's Play to Grow is unaffiliated with Howell's Child Care Center and none of the premiums on the Hartford policy were paid by Howell's Child Care Center, one employer does not bear the burden of paying double premiums. Second, Mrs. Hieb will not recover twice for the same injury since, based on our holding below, St. Paul is entitled to a lien against all amounts paid or to be paid to Mrs. Hieb by Hartford pursuant to its UIM coverage.

[2] Plaintiffs argue in their second assignment of error that the trial court erred when it determined that St. Paul was entitled to a workers' compensation lien against all amounts paid or to be paid to Mrs. Hieb by Hartford pursuant to its UIM coverage. We cannot agree.

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In light of this Court's holding in *Ohio Casualty Group v. Owens, supra*, and *Bailey v. Nationwide Mutual Ins. Co.*, 112 N.C. App. 47, 434 S.E.2d 625 (1993) that

N.C. General Statute Section 97-10.2 provides for the subrogation of the workers' compensation insurance carrier . . . to the employer's right, upon reimbursement of the employee, to any payment, including uninsured/underinsured motorist insurance proceeds, made to the employee by or on behalf of a third party as a result of the employee's injury,

plaintiffs' second assignment of error is overruled. St. Paul is entitled to a workers' compensation lien against all amounts paid or to be paid to Mrs. Hieb by Hartford pursuant to its UIM coverage.

The order of the trial court granting defendant Hartford's motion for summary judgment is reversed, and the order granting defendant St. Paul's motion for summary judgment is affirmed.

The order of the trial court is

Affirmed in part and reversed in part.

Judges LEWIS and MARTIN concur.

GILES v. SMITH

[112 N.C. App. 508 (1993)]

TONI GILES, GUARDIAN AD LITEM FOR CODA LAMAR GILES, PLAINTIFF v.
BERTHA SMITH, ADMINISTRATRIX OF THE ESTATE OF HAROLD SMITH,
DEFENDANT

TONI GILES, PLAINTIFF v. BERTHA SMITH, ADMINISTRATRIX OF THE ESTATE
OF HAROLD SMITH, DEFENDANT

SHIRLEY SMITH, PLAINTIFF v. BERTHA SMITH, ADMINISTRATRIX OF THE ESTATE
OF HAROLD SMITH, DEFENDANT

SHIRLEY SMITH, GUARDIAN AD LITEM FOR KUENETE SMITH, PLAINTIFF v.
BERTHA SMITH, ADMINISTRATRIX OF THE ESTATE OF HAROLD SMITH,
DEFENDANT

TONI GILES, GUARDIAN AD LITEM FOR COURTNEY SHAMAR GILES, PLAINTIFF
v. BERTHA SMITH, ADMINISTRATRIX OF THE ESTATE OF HAROLD SMITH,
DEFENDANT

No. 9213DC1064

(Filed 2 November 1993)

Automobiles and Other Vehicles § 536 (NCI4th)— driver incapacitated by seizure—instruction on sudden emergency error—unavoidable accident

In an action to recover for personal injuries sustained in an automobile accident where the evidence tended to show that the driver of the vehicle suffered a seizure, “slumped over” the wheel of the car, and then lost control of the vehicle, the trial court erred in instructing the jury on the doctrine of sudden emergency rather than the defense of unavoidable accident.

Am Jur 2d, Automobiles and Highway Traffic § 773.

Appeal by defendant from order entered 26 June 1992 in Columbus County District Court by Judge Jerry A. Jolly. Heard in the Court of Appeals 30 September 1993.

This action involves five separate lawsuits, commenced by plaintiffs on 6 August 1991 and consolidated for trial. Plaintiffs, passengers in a car driven by Harold Smith, alleged that the personal injuries they sustained when the car left the road and ran into a ditch were caused by the negligence of Harold Smith. The only evidence

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at trial was presented by plaintiff. The evidence tended to show that Smith was driving a car occupied by plaintiffs and that Smith slumped over and lost control of the car. At defendant's request, the trial court instructed the jury on the doctrine of sudden emergency. After the jury retired for deliberations, defendant moved, pursuant to N.C. Gen. Stat. § 1A-1, Rule 15(b), to amend her pleading to conform to the evidence to plead the doctrine of sudden emergency. The trial court denied defendant's motion. The jury returned verdicts in favor of defendant, and judgment for defendant was entered on those verdicts. Plaintiff moved to set aside the verdict and for a new trial pursuant to N.C. Gen. Stat. § 1A-1, Rules 59 and 60. The trial court granted plaintiffs' Rule 59 motion and ordered a new trial. Defendant appealed from that order.

Marvin J. Tedder for plaintiffs-appellees.

Johnson & Lambeth, by Maynard M. Brown, for defendant-appellant.

WELLS, Judge.

Pursuant to one of her assignments of error, defendant contends that the trial court erred in setting aside the judgment and ordering a new trial. Rule 59 provides in pertinent part:

(a) Grounds.—A new trial may be granted to all or any of the parties and on all or part of the issues for any of the following grounds:

. . .

(8) Error in law occurring at the trial and objected to by the party making the motion.

N.C. Gen. Stat. § 1A-1, Rule 59 of the Rules of Civil Procedure.

The question presented by this assignment of error arose out of these somewhat unusual circumstances. At trial, two of the plaintiffs, Toni Giles and Shirley Smith, testified that they were passengers in a car being driven by defendant's intestate, Harold Smith. They were traveling on a rural road in Brunswick County when Smith ran off the road to the right, hit a parked car, returned to the road, and ran off the road again into a canal and sandpile. Plaintiffs and the other passengers were injured in the collision. On cross-examination by defendant, without objection by plaintiffs, both of these witnesses gave testimony tending to show that just

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prior to running off the road, Harold Smith, the driver, appeared to suffer a seizure which caused him to "slump over" the steering wheel, become rigid, and lose control of the car.

At the charge conference, defendant requested an instruction on "sudden emergency," and, over plaintiffs' objection, the trial court gave such a charge. After the jury retired, defendant moved pursuant to Rule 15(b) to amend her pleadings to conform to the evidence to plead sudden emergency as an affirmative defense. The trial court denied that motion. After the jury returned verdicts for the defendant on the negligence issues and judgment was entered, plaintiffs moved for a new trial pursuant to Rule 59 on the grounds that the trial court had erred in charging on sudden emergency. The trial court subsequently entered the following order:

THIS CAUSE coming to be heard, and being heard, upon the Plaintiffs' Motion timely made to the Court pursuant to Rule 7(b)(1) of the North Carolina Rules of Civil Procedure immediately following the return of the jury's verdict in the above causes during the June 8th, 1992, Session of Civil District Non-Jury Court for Columbus County, North Carolina, wherein said Plaintiffs, by and through counsel, moved the Court to set aside Judgment and for a new trial pursuant to Rules 59(a)(3)(8)(9) and 60(a)(b)(1) of the North Carolina Rules of Civil Procedure;

AND IT APPEARING TO THE COURT that Plaintiffs' Motion made pursuant to Rule 59(a)(8) is meritorious in that an error of law had occurred during the trial of these matters whereby the jury was, over timely objections duly made the Plaintiffs, instructed as to the sudden emergency doctrine, when the same had not been plead as an affirmative defense in the Defendant's pleadings as required by Rule 8 of the North Carolina Rules of Civil Procedure;

IT IS, THEREFORE, in the discretion of the Court, ORDERED that the verdict previously rendered be set aside, and a new trial granted in all cases as hereinabove entitled.

IT IS SO ORDERED, this the 8th day of June, 1992.

The consideration of sudden emergency has been described as a convenient name for the effect which certain external forces can have on the determination of whether an individual has breached a duty of reasonable care. *Bolick v. Sunbird Airlines, Inc.*, 96 N.C.

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App. 443, 386 S.E.2d 76 (1989), *aff'd*, 327 N.C. 464, 396 S.E.2d 323 (1990). Sudden emergency does not change or reduce the standard of reasonable care. It is simply one of the factors to be considered in determining whether a person acted reasonably under the circumstances. *Id.* The sudden emergency doctrine permits the court to call to the attention of the jury that an emergency faced by the actor may influence its determination of whether specific conduct was reasonable under the circumstances. The doctrine of sudden emergency is not a legal defense which operates to bar an action. *Id.* But *cf. Hinson v. Brown*, 80 N.C. App. 661, 343 S.E.2d 284, *rev. denied*, 318 N.C. 282, 348 S.E.2d 138 (1986) (holding that sudden emergency is an affirmative defense which must be specifically plead). External forces that have been found to create sudden emergencies include: automobile crossing the center line, *Roberts v. Whitley*, 17 N.C. App. 554, 195 S.E.2d 62 (1973); a tire blowing out, *Ingle v. Cassady*, 208 N.C. 497, 181 S.E.2d 562 (1935), *Crowe v. Crowe*, 259 N.C. 55, 129 S.E.2d 585 (1963); a disabled vehicle partially blocking the road at night, *Foy v. Bremson*, 286 N.C. 108, 209 S.E.2d 439 (1974); and severe weather, such as dense fog, *Lawing v. Landis*, 256 N.C. 677, 124 S.E.2d 877 (1962), and severe rain, *Bolick*, *supra*. See generally, Charles E. Daye and Mark W. Morris, North Carolina Law of Torts § 16.40.4 (1991). But see Jeffrey F. Ghent, Annotation, *Modern Status of Sudden Emergency Doctrine*, 10 A.L.R. 5th 680 (1993), for a criticism of the rule.

The doctrine of sudden emergency should not be confused with the defense of "unavoidable accident." Prosser and Keeton define unavoidable accident as "an occurrence which was not intended and which, under all the circumstances, could not have been foreseen or prevented by the exercise of reasonable precautions." W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 29, at 162 (5th ed. 1984). An unavoidable accident "can only occur in the absence of causal negligence." *Brewer v. Majors*, 48 N.C. App. 202, 268 S.E.2d 229, *rev. denied*, 301 N.C. 400, 273 S.E.2d 445 (1980). Our courts have recognized and applied the term "unavoidable accident" to the following circumstances: a woman injured by a dog on a leash, *Hunnicut v. Lundberg*, 94 N.C. App. 210, 379 S.E.2d 710 (1989); children darting into the street, *Dixon v. Lilly*, 257 N.C. 228, 125 S.E.2d 426 (1962); and defective brakes, *Indiana Lumbermen's Mutual v. Champion*, 80 N.C. App. 370, 343 S.E.2d 15 (1986). There is no liability in these cases because defend-

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ant is simply not negligent. This Court has also recognized that sudden incapacitation caused by seizure can result in an unavoidable accident. In *Wallace v. Johnson*, 11 N.C. App. 703, 182 S.E.2d 193, cert. denied, 279 N.C. 397, 183 S.E.2d 247 (1971), this Court held that “the operator of a motor vehicle who becomes suddenly stricken by a fainting spell or other sudden and unforeseeable incapacitation, and is, by reason of such unforeseen disability, unable to control the vehicle, is not chargeable with negligence.” See also *Smith v. Garrett*, 32 N.C. App. 108, 230 S.E.2d 775 (1977) (affirmative defense raised by evidence that defendant suffered a sudden seizure) and *Mobley v. Estate of Johnson*, 111 N.C. App. 422, 432 S.E.2d 425 (1993) (conflicts in evidence raised question of whether incapacitating stroke occurred before or as a result of automobile collision).

When the trial court instructs the jury on an issue not raised by the evidence, a new trial is required. See *Jacobs v. Locklear*, 310 N.C. 735, 314 S.E.2d 544 (1984). That is what occurred in this case, and, for that reason, we must affirm the trial court’s order.

The order of the trial court granting a new trial is

Affirmed.

Judges LEWIS and MARTIN concur.

STATE OF NORTH CAROLINA v. WILLIAM ELBERT SMITH, DEFENDANT

No. 9310SC29

(Filed 2 November 1993)

1. Criminal Law § 1281 (NCI4th)— habitual felon statute— constitutionality

Conviction under the habitual felon statute does not violate a defendant’s constitutional rights to equal protection, due process of law and freedom from double jeopardy, nor does the sentence amount to cruel and unusual punishment.

Am Jur 2d, Habitual Criminals and Subsequent Offenders

§ 5.

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[112 N.C. App. 512 (1993)]

Imposition of enhanced sentence under recidivist statute as cruel and unusual punishment. 27 ALR Fed. 110.

2. Criminal Law § 1283 (NCI4th)— habitual felon—separate indictment

Defendant was properly charged as an habitual felon in a separate indictment even though the charge of possession with intent to sell or deliver cocaine was contained in indictment 89 CRS 77510(A), and the habitual felon charge was contained in indictment 89 CRS 77510(B). N.C.G.S. § 14-7.3.

Am Jur 2d, Habitual Criminals and Subsequent Offenders §§ 20, 21.

3. Criminal Law § 1283 (NCI4th)— habitual felon—notice of prior crimes—sufficiency of notice

Defendant was given sufficient notice of the prior felony conviction which would be used against him to convict him as an habitual felon, though the indictment alleged the date upon which defendant was sentenced for the prior crime rather than the date upon which defendant pled guilty.

Am Jur 2d, Habitual Criminals and Subsequent Offenders §§ 20, 21.

Form and sufficiency of allegations as to time, place, or court of prior offenses or convictions, under habitual criminal act or statute enhancing punishment for repeated offenses. 80 ALR2d 1196.

4. Criminal Law § 1283 (NCI4th)— habitual felon—date of prior crimes or date of arrest—sufficiency of notice

Either an arrest date or the date that prior felonies were actually committed is sufficient to give defendant notice of the specific felonies which are being alleged in an habitual felon indictment.

Am Jur 2d, Habitual Criminals and Subsequent Offenders §§ 20, 21.

Form and sufficiency of allegations as to time, place, or court of prior offenses or convictions, under habitual criminal act or statute enhancing punishment for repeated offenses. 80 ALR2d 1196.

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[112 N.C. App. 512 (1993)]

5. Criminal Law § 1283 (NCI4th)— habitual felon—underlying convictions used more than once to enhance conviction—no error

There was no merit to defendant's contention that, once certain underlying convictions are used to convict an individual as an habitual felon, those same convictions may not be used again to enhance another conviction, since being an habitual felon is a status which, once attained, is never lost.

Am Jur 2d, Habitual Criminals and Subsequent Offenders §§ 20, 21.

Appeal by defendant from judgment and commitment entered 23 September 1992 by Judge Wiley F. Bowen in Wake County Superior Court. Heard in the Court of Appeals 28 September 1993.

Attorney General Michael F. Easley, by Assistant Attorney General Jeffrey P. Gray, for the State.

John T. Hall for defendant.

LEWIS, Judge.

Defendant was convicted of possession of cocaine with intent to sell and deliver. After the jury found defendant guilty of possession, they were then asked to determine whether or not defendant was an habitual felon. Defendant was found guilty of being an habitual felon and has appealed his convictions to this Court. The facts leading to defendant's arrest and conviction are unessential and will be discussed only to the extent that they are necessary to understand defendant's assignments of error.

[1] In his first assignment of error defendant claims that the trial court erred in denying his motion to dismiss the habitual felon indictment on the basis that it violated his constitutional rights to equal protection, due process of law and freedom from double jeopardy and that the sentence was cruel and unusual punishment. At the outset of his brief, defendant acknowledges that our Supreme Court has previously addressed these issues in *State v. Todd*, 313 N.C. 110, 326 S.E.2d 249 (1985). There the Court held that the "legislature has acted within constitutionally permissible bounds in enacting legislation designed to identify habitual criminals and to authorize enhanced punishment as provided. The procedures set forth in N.C.G.S. § 14-7.1 to -7.6 likewise comport with the defendant's federal and state constitutional guarantees." *Id.* at 118,

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326 S.E.2d at 253. Defendant's assertions are virtually identical to those advanced in *Todd* and we see no need to revisit them here. We find no abuse of discretion or procedural misconduct prejudicial to defendant. Accordingly, defendant's first assignment of error is overruled.

[2] For his second assignment of error, defendant challenges the denial of his motion to dismiss arguing that the habitual felon indictment failed to comply with the statutory requirements. We do not agree. N.C.G.S. § 14-7.3 provides:

An indictment which charges a person who is an habitual felon within the meaning of G.S. 14-7.1 with the commission of any felony under the laws of the State of North Carolina must, in order to sustain a conviction of habitual felon, also charge that said person is an habitual felon. The indictment charging the defendant as an habitual felon shall be separate from the indictment charging him with the principal felony. An indictment which charges a person with being an habitual felon must set forth the date that prior felony offenses were committed, the name of the state or other sovereign against whom said felony offenses were committed, the dates that pleas of guilty were entered to or convictions returned in said felony offenses, and the identity of the court wherein said pleas or convictions took place.

Defendant's second assignment of error actually combines several different statutory challenges and we will address each in order. Section 14-7.3 contains obvious internal inconsistencies, but case law has made it clear that an habitual felon charge shall appear in a separate indictment. This was evidenced by the Supreme Court's statement in *State v. Allen*, 292 N.C. 431, 233 S.E.2d 585 (1977), where the Court held:

Properly construed this act clearly contemplates that when one who has already attained the status of an habitual felon is indicted for the commission of another felony, that person may then be also indicted in a *separate bill* as being an habitual felon.

Id. at 433, 233 S.E.2d at 587 (emphasis added). Defendant claims that this requirement was not satisfied because the charge of possession with intent to sell or deliver cocaine was contained in indictment 89 CRS 77510(A), whereas the habitual felon charge was

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contained in indictment 89 CRS 77510(B). Defendant argues that this is the same indictment and does not meet the requirement that the habitual felon charge be contained in a separate indictment. Although the habitual felon indictment was labeled 89 CRS 77510(B), the record reveals that it was contained in a separate indictment. There is no difference in the State's use of a part (B) to 89 CRS 77510 than if the indictment had received a completely different number. The use of a part (A) and (B) was merely an administrative attempt to satisfy the requirements of an obviously inconsistent statute and defendant has in no way been prejudiced.

[3] The second part of defendant's argument is that indictment 89 CRS 77510(B) is defective in that it failed to allege the date of defendant's guilty plea as required by N.C.G.S. § 14-7.3. The first paragraph of 89 CRS 77510(B) charges that defendant pled guilty to possession of heroin in 1981 and was sentenced on 7 December 1981. It is true that the allegation does not contain the date upon which defendant pled guilty, but we do not consider this a fatal defect. The purpose of an indictment has always been to give a defendant notice of the charge or charges against him and this is not changed in an habitual felon indictment. *See State v. Allen*, 292 N.C. 433, 233 S.E.2d 585 (1977). Instead of giving the date upon which defendant pled guilty, paragraph one gave the date defendant was sentenced for the same charge. We find that this was sufficient to give defendant notice of the prior felony conviction which would be used against him to convict him as an habitual felon.

[4] Defendant also claims that his motion to dismiss should have been granted because no evidence was presented as to the dates on which the prior offenses were *actually committed*. The habitual felon indictment clearly alleged the dates upon which the prior felonies occurred. However defendant contends that at trial contradictory evidence was presented suggesting that the dates which the State alleged were actually the dates when defendant was arrested and not the dates when the prior felonies were committed. We do not believe that such a strict construction is required as defendant suggests. Often it is impossible to know the actual date upon which a felony was committed. However, the arrest date is always documented and readily obtainable. We find that both are sufficient to give the defendant notice of the specific felonies which are being alleged in the habitual felon indictment. We find no merit to defendant's second assignment of error.

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[5] In his third assignment of error, defendant claims that the habitual felon statute is unconstitutional as applied to him. In essence defendant argues that once certain underlying convictions are used to convict an individual as an habitual felon, those same convictions may not be used again to enhance another conviction. We do not agree. It has been said on many occasions that being an habitual felon is a status. *State v. Thomas*, 82 N.C. App. 682, 347 S.E.2d 494 (1986), *cert. denied*, 320 N.C. 637, 360 S.E.2d 102 (1987). As quoted previously, the Supreme Court described the habitual felon process in *State v. Allen*, 292 N.C. 431, 233 S.E.2d 585 (1977), by stating once an individual "who has already attained the status of an habitual felon is indicted for the commission of another felony, that person may then be also indicted in a separate bill as being an habitual felon." This implies that being an habitual felon is a status, that once attained is never lost. If the legislature had wanted to require the State to show proof of three new underlying felonies before a new habitual felon indictment could issue, then the legislature could have easily stated such. We will not rewrite the statute.

Although defendant's assignment of error is one of first impression, our decision is buttressed by comparison to other examples where prior convictions have been used to enhance sentences. In *State v. Roper*, 328 N.C. 337, 402 S.E.2d 600, *cert. denied*, 112 S.Ct. 280, 116 L. Ed. 2d 232 (1991), the trial court used the same prior convictions to establish defendant's status as an habitual felon and to aggravate his underlying offense of kidnapping. Given that our Supreme Court held that this was proper, we find no merit to defendant's assignment of error.

In his fourth assignment of error defendant claims that the trial court erred in overruling his objections regarding the admissibility of evidence relating to undercover drug operations and the street value of cocaine. We have considered defendant's arguments and find that we need not address them further. N.C.G.S. § 15A-1443(a) provides that a defendant is prejudiced by errors relating to rights other than under the Constitution when there is a reasonable possibility that had the error not been committed the jury would have reached a different result. The burden of proving this is on the defendant. After reviewing the record we find that the evidentiary issues to which defendant objected were minor and did not affect his convictions. We find no merit to defendant's last assignment of error.

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[112 N.C. App. 518 (1993)]

Defendant received a fair trial free from prejudicial error.

No error.

Judges WELLS and MARTIN concur.

RUTH M. KEYS, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF
HARRY E. KEYS, DECEASED v. DUKE UNIVERSITY, TRADING AND DOING
BUSINESS AS DUKE UNIVERSITY HOSPITAL AND PRIVATE DIAGNOSTIC
CLINIC

No. 9214SC1144

(Filed 2 November 1993)

**Death § 31 (NCI4th); Husband and Wife § 5 (NCI4th)— loss of
consortium—claim included in wrongful death action**

The trial court properly dismissed plaintiff's claim brought in her individual capacity for loss of consortium based on the ground that the wrongful death statute, N.C.G.S. § 28A-18-2, encompasses loss of consortium claims, since any common law claim encompassed by the wrongful death statute must be asserted under this statute by the personal representative for the deceased.

Am Jur 2d, Death § 254.

Appeal by plaintiff Ruth M. Keys from order entered 24 August 1992 and signed 10 September 1992 by Judge Robert H. Hobgood in Durham County Superior Court. Heard in the Court of Appeals 7 October 1993.

On 27 April 1992, Plaintiff Ruth M. Keys filed a complaint against defendants asserting a claim for wrongful death in her capacity as administratrix of her husband's estate and a claim for loss of consortium in her individual capacity. Plaintiff filed an amended complaint for the same claims on 25 June 1992. Subsequently, defendants filed an answer to the amended complaint, denying plaintiff's allegations and moving to dismiss plaintiff's claim for loss of consortium pursuant to N.C. R. Civ. P. 12(b)(6).

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[112 N.C. App. 518 (1993)]

On 10 September 1992, Judge Robert H. Hobgood entered an order granting defendants' motion to dismiss the loss of consortium claim of Plaintiff Ruth M. Keys, individually, and certifying this matter to be heard before the Court of Appeals. From this order, plaintiff appeals.

R. Marie Sides for plaintiff-appellant.

Moore & Van Allen, by William E. Freeman, for defendant-appellees.

ORR, Judge.

On 12 March 1990, plaintiff's husband, Harry E. Keys, was admitted to Duke University Hospital for congestive heart failure, and on 14 March 1990, he underwent cardiac surgery. In plaintiff's complaint she alleged that on 3 April 1990, plans were being made to discharge Mr. Keys to his home. Further, plaintiff alleged that on 19 April 1990, Mr. Keys was mistakenly given medication which resulted in a "Code 5" which resulted in Mr. Keys being sent back into the intensive care unit. Plaintiff also alleged that Mr. Keys showed signs of significant improvement and that he was able to communicate on or about 27 April 1990, at which time a morphine drip was initiated and increased to twenty milligrams per hour at about 11:00 p.m. On 28 April 1990, at 2:00 p.m., defendants extubated Mr. Keys without oxygen support, and he was pronounced dead at 2:50 p.m.

Plaintiff brought this action against defendants for the wrongful death of Mr. Keys and for loss of consortium. Plaintiff brought her wrongful death claim as administratrix of Mr. Keys' estate under the wrongful death statute, N.C. Gen. Stat. § 28A-18-2, and she brought her loss of consortium claim in her individual capacity. Upon motion by defendants, the trial court dismissed the consortium claim of plaintiff brought in her individual capacity. From the dismissal of her claim, plaintiff appeals.

Plaintiff, in her sole assignment of error, contends that the trial court erred in dismissing her claim for loss of consortium pursuant to N.C. R. Civ. P. 12(b)(6), for failure to state a claim upon which relief can be granted. We disagree.

"A Rule 12(b)(6) motion tests the legal sufficiency of the claim." *Chrysler Credit Corp. v. Rebhan*, 66 N.C. App. 255, 257, 311 S.E.2d 606, 608 (1984).

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Under the "notice theory of pleading," a statement of a claim can withstand a motion to dismiss if it gives the other party notice of the nature and basis of the claim sufficient to enable the party to answer and prepare for trial. . . . A claim for relief should not be dismissed unless it appears beyond doubt that the party is entitled to no relief under any state of facts which could be presented in support of the claim. . . . Therefore, the essential question on a Rule 12(b)(6) motion, is whether the complaint, when liberally construed, states a claim upon which relief can be granted on *any* theory.

Barnaby v. Boardman, 70 N.C. App. 299, 302, 318 S.E.2d 907, 909, *disc. review allowed*, 312 N.C. 621, 323 S.E.2d 921 (1984), *rev'd on other grounds*, 313 N.C. 565, 330 S.E.2d 600 (1985) (emphasis in original) (citations omitted).

Defendants contend that the trial court properly dismissed plaintiff's claim brought in her individual capacity for loss of consortium based on the ground that the wrongful death statute, N.C. Gen. Stat. § 28A-18-2 (Cum. Supp. 1992), encompasses loss of consortium claims, and any common law claim encompassed by the wrongful death statute must be asserted under this statute by the personal representative for the deceased. We agree.

This Court has held that "any common law claim which is now encompassed by the wrongful death statute must be asserted under that statute." *Christenbury v. Hedrick*, 32 N.C. App. 708, 712, 234 S.E.2d 3, 5 (1977) (holding proper the dismissal of an action by the surviving mother for medical and funeral expenses incurred on behalf of her unemancipated minor children who died as a result of an automobile accident). Further, loss of consortium is a common law claim. *See Nicholson v. Hugh Chatham Memorial Hosp., Inc.*, 300 N.C. 295, 266 S.E.2d 818 (1980). Thus, the determinative issue on appeal is whether plaintiff's claim for loss of consortium is covered under the wrongful death statute.

The North Carolina wrongful death statute states in pertinent part:

(a) When the death of a person is caused by a wrongful act, neglect or default of another, such as would, if the injured person had lived, have entitled him to an action for damages therefor, the person or corporation that would have been so liable . . . shall be liable to an action for damages, to be

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brought by the personal representative or collector of the decedent

(b) Damages recoverable for death by wrongful act include:

- (1) Expenses for care, treatment and hospitalization incident to the injury resulting in death;
- (2) Compensation for pain and suffering of the decedent;
- (3) The reasonable funeral expenses of the decedent;
- (4) The present monetary value of the decedent to the persons entitled to receive the damages recovered, including but not limited to compensation for the loss of the reasonably expected:

a. Net income of the decedent,

b. Services, protection, care and assistance of the decedent, whether voluntary or obligatory, to the persons entitled to the damages recovered,

c. Society, companionship, comfort, guidance, kindly offices and advice of the decedent to the persons entitled to the damages recovered;

- (5) Such punitive damages as the decedent could have recovered had he survived, and punitive damages for wrongfully causing the death of the decedent through maliciousness, wilful or wanton injury, or gross negligence;

- (6) Nominal damages when the jury so finds.

N.C. Gen. Stat. § 28A-18-2 (Cum. Supp. 1992).

Thus the wrongful death statute permits "beneficiaries to recover, in addition to lost income, compensation for the decedent's medical and funeral expenses, his pain and suffering, and loss of the decedent's services, protection, care, assistance, society, companionship, comfort, guidance, kindly offices and advice, among other things." *DiDonato v. Wortman*, 320 N.C. 423, 429, 358 S.E.2d 489, 492 (1987).

In North Carolina, a claim for loss of consortium "embraces service, society, companionship, sexual gratification and affection" *Nicholson*, 300 N.C. at 302, 266 S.E.2d at 822. Additionally,

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our Supreme Court has stated, "experience with the North Carolina wrongful death statute, G.S. 28A-18-2(b), *which does allow compensation for loss of consortium*, indicates trial courts and juries recognize and can measure such damage to society, affection and companionship." *Id.* (emphasis added). Thus, by the plain language of the wrongful death statute, and in light of the statement made by our Supreme Court in *Nicholson, supra*, the North Carolina wrongful death statute encompasses a claim for loss of consortium, and we hold, therefore, that plaintiff's claim in the present action should have been brought under that statute.

Plaintiff argues, however, that the statute does not provide for recovery for her mental anguish and that her action for loss of consortium should be allowed to stand so that she can recover damages as a result of her mental anguish. Although the law in North Carolina is unclear as to whether a plaintiff may recover for mental anguish in an action for loss of consortium, what is clear from the language cited above is that the tort claim for "loss of consortium", no matter what damages may be recovered thereunder, is covered under the wrongful death statute, and plaintiff may not, therefore, bring an independent claim for loss of consortium in this action.

We conclude, therefore, that the trial court did not err in dismissing plaintiff's independent claim for loss of consortium, and accordingly we affirm the order of the trial court.

Affirmed.

Judges EAGLES and GREENE concur.

HOUSE OF RAEFORD FARMS, INC. v. CITY OF RAEFORD

No. 9216SC1118

(Filed 2 November 1993)

**Environmental Protection § 71 (NC14th)— wastewater permit—
notice of show cause hearing—assessment of penalties and
costs unauthorized**

A municipality could not assess penalties and costs against an industrial user where the notice for the hearing was solely

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[112 N.C. App. 522 (1993)]

for the industrial user to present evidence to show cause why its permit to discharge wastewater should not be revoked; furthermore, even if the notice had been sufficient in content to enable petitioner to meet the issues of civil penalties and enforcement costs, the city did not have the authority to assess such penalties and costs at the show cause hearing, since the proper procedure to recover such penalties and costs is for the city to commence an action in the General Court of Justice.

Am Jur 2d, Pollution Control § 468 et seq.

Appeal by plaintiff from judgments entered 22 July 1992 and 31 August 1992 in Hoke County Superior Court by Judge B. Craig Ellis. Heard in the Court of Appeals 6 October 1993.

Jordan, Price, Wall, Gray & Jones, by Henry W. Jones, Jr. and Jeffrey S. Whicker, for petitioner-appellant.

Everett, Womble, Finan & Riddle, by W. Harrell Everett, Jr., for respondent-appellee.

GREENE, Judge.

House of Raeford Farms, Inc. (petitioner) appeals from the dismissal of its petition for writ of certiorari to review penalties and costs assessed against petitioner by the City of Raeford (the City).

The record reveals that petitioner owns and operates a turkey slaughtering and processing business located in Raeford, North Carolina. On 1 July 1987, the City issued to petitioner Permit #5161, authorizing the discharge of wastewater into the City's sewage system in accordance with effluent limitations, monitoring requirements, and other conditions in the permit. In September, 1987, the City reduced petitioner's limits for Biochemical Oxygen Demand (BOD), and on 1 September 1989, the City issued to petitioner a new permit with reduced limits for BOD, Total Suspended Solids, and first-time limits for Chemical Oxygen Demand. These modifications forced petitioner to change its treatment process in order to comply with the new permit limits.

On 1 June 1990, the City issued a Show Cause Order regarding its previous 21 February 1990 Notice of Non-Compliance to petitioner. This Order stated that "[w]ithin 15 days from receipt of this notice, [petitioner] may request a hearing before the Superin-

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tendent and at said hearing will be allowed to show cause as to why the [petitioner's] Permit #4161 [sic] should not be revoked." Counsel for petitioner requested a Show Cause Hearing by letter dated 7 June 1990, noting that his client "intends to show cause as to why its permit should not be revoked." Thomas A. Phillips (the Hearing Officer), by letter dated 20 June 1990, granted this request "to show cause as to why House of Raeford Farms, Inc. permit #5161 should not be revoked." On 25 July 1990, the Hearing Officer issued his decision which assessed \$50,000 in penalties and \$19,072.04 in enforcement costs against petitioner and ordered that failure to pay these sums within five days would result in the revocation of petitioner's permit. In addition, the Hearing Officer's decision required petitioner to post a \$100,000 performance bond to insure substantial compliance with the permit and city ordinances despite petitioner's undisputed continuous compliance since 18 June 1990.

On 12 October 1990, petitioner filed an application for stay of the 25 July 1990 decision of the Hearing Officer and a petition for writ of certiorari in Hoke County Superior Court to review the assessments and requirements of the same decision. On 16 November 1990, the City moved to dismiss the petition for writ of certiorari, to strike certain allegations, and to deny the application for stay.

The trial court issued the writ on 20 December 1991 without prejudice to the City's motions to dismiss and motion to strike. After a hearing held 14 February 1992, the trial court granted the City's motion to dismiss the petition by judgment dated 22 July 1992. On 29 July 1992, petitioner moved for findings of fact and conclusions of law pursuant to N.C. R. Civ. P. 52(a)(2) and filed notice of appeal on 20 August 1992. The trial court issued a second judgment on 31 August 1992, making findings of fact and conclusions of law from which the plaintiff also appeals.

The issue presented is whether a municipality can assess penalties and costs against an industrial user where the notice for the hearing was solely for the industrial user to present evidence to show cause why its permit to discharge wastewater should not be revoked.

Our standard of review is whether the evidence before the Hearing Officer supported his decision since in proceedings of this

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nature, the Hearing Officer is the fact finder, not the superior court. *Coastal Ready-Mix Concrete Co. v. Board of Commissioners of the Town of Nags Head*, 299 N.C. 620, 626-27, 265 S.E.2d 379, 383, *reh'g denied*, 300 N.C. 562, 270 S.E.2d 106 (1980).

The administrative penalties in Section 18.125.0 of the City's Water and Sewage Ordinance provide that a Show Cause hearing shall be held within 15 days of notice which:

shall be served on the user specifying the time and place for the hearing, **the proposed enforcement action**, and the reasons for such action, and a request that the user show cause why this proposed enforcement action should not be taken . . . the Superintendent . . . may issue an order to the user directing that . . . permission to discharge be revoked Further orders and directives as are necessary and appropriate may be issued.

City of Raeford's Sewer Use and Pretreatment Ordinance § 18.125.3 (1990) (emphasis added). When an ordinance provides the time, place, manner, and form of notice, the notice must conform with what is prescribed in the ordinance; otherwise, any action taken pursuant to the improper notice is invalid. 2 Am. Jur. 2d *Administrative Law* §§ 359, 360 (1962). Furthermore, the notice must be sufficient in content to enable the party to "prepare his defense or to meet the issue involved." *Id.* at § 360; see *Eugene McQuillin, The Law of Municipal Corporations* § 26.89 (3d ed. 1986) (administrative proceeding to revoke permit must be fair in that permittee must be fully apprised of claims against him).

Based on the 1 June 1990 Show Cause Order from the City, the letter dated 7 June 1990 from counsel for petitioner to the City, and the 20 June 1990 letter from the Hearing Officer to petitioner, there is nothing to indicate that any other matters besides the decision to revoke or not to revoke petitioner's permit were to be argued at the Show Cause Hearing. Because the only question properly before the City at the Show Cause Hearing was whether petitioner's permit should be revoked, the notice was insufficient to prepare petitioner to meet the issues of penalties and costs. Therefore, the Hearing Officer went beyond the scope of the hearing when he ordered petitioner to pay \$69,072.04 in penalties and enforcement costs, and the order must be vacated. See *Garrison v. Miller*, 40 N.C. App. 393, 396, 252 S.E.2d 851, 853 (beyond scope of authority to declare policy unconstitutional when only question

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presented at show cause hearing concerned continuation of temporary injunction), *disc. rev. denied*, 297 N.C. 452, 256 S.E.2d 805 (1979).

Furthermore, even if the notice had been sufficient in content to enable petitioner to meet the issues of civil penalties and enforcement costs, the City did not have the authority to assess such penalties and costs at a Show Cause Hearing. In this case, the Hearing Officer attempted to assess and collect civil penalties and enforcement costs; however, the proper procedure to recover such penalties and costs is for the City to commence an action in the General Court of Justice for Hoke County. *City of Raeford's Sewer Use and Pretreatment Ordinance* § 18.126.0. While the City argues in its brief that the language, "Further orders and directives as are necessary and appropriate may be issued," Section 18.125.3, gives the Hearing Officer authority to impose penalties and costs, we reject this contention since the specific procedure for recovering such penalties and costs is set out in Section 18.126. *See Nucor Corp. v. General Bearing Corp.*, 333 N.C. 148, 155, 423 S.E.2d 747, 751 (1992) (where statute deals with subject in specific detail while another deals with same subject in general terms, specific statute controls absent clear legislative intent to contrary), *reh'g denied*, 333 N.C. 349, 426 S.E.2d 708 (1993). We do note, however, that the legislature passed N.C. Gen. Stat. § 143-215.6A(j), effective 1 October 1991, authorizing municipalities to assess civil penalties for violations of their respective pretreatment programs. Accordingly, the order of the Superior Court dismissing the petition for certiorari is reversed and the case remanded to the Superior Court for entry of an order vacating the City's assessment of penalties and costs.

Reversed and remanded.

Judges EAGLES and ORR concur.

CORNERSTONE CONDOMINIUM ASSN. v. O'BRIEN

[112 N.C. App. 527 (1993)]

CORNERSTONE CONDOMINIUM ASSOCIATION, INC. v. PATRICK O'BRIEN
AND WIFE, PATRICIA O'BRIEN

No. 9219DC1007

(Filed 2 November 1993)

**Housing, and Housing Authorities and Projects § 69 (NCI4th)—
condominium association's bylaws—timely recording of amend-
ment mandatory**

The trial court erred in finding that failure to record an amendment to plaintiff condominium association's bylaws at the office of the Register of Deeds within ten days of adoption as required by the bylaws was not fatal to the amendment.

**Am Jur 2d, Condominiums and Cooperative Apartments
§ 17.**

Judge JOHNSON dissenting.

Appeal by defendants from judgment entered 8 July 1992 by Judge Clarence E. Horton in Cabarrus County District Court. Heard in the Court of Appeals 16 September 1993.

Plaintiff is a duly incorporated association for the Cornerstone Condominiums located in Concord, North Carolina. Defendants are the owners of a unit within the Cornerstone Condominiums and are resident members of the plaintiff organization. This appeal arises out of plaintiff's attempt to force defendants to get rid of their dog.

On 9 September 1991, the plaintiff's Board of Directors voted to amend Article XI of plaintiff's by-laws to read, in pertinent part:

Those who now reside in the condominium and have pets on the premises may continue to keep those pets as long as such residents or members reside in the condominium; however, no additional pets may be brought to or kept on the premises by any resident or member after September 9, 1991.

The association recorded the purported amendment to the by-laws in the Cabarrus County Register of Deeds on 16 October 1991. Sometime thereafter, defendants acquired a dog which they kept on the premises at least until the time defendants assembled the record on appeal. On 11 March 1992, after making several written

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[112 N.C. App. 527 (1993)]

and verbal demands, plaintiff brought this action to compel the defendants to remove their dog from the premises.

On 8 July 1992, the case was heard in the Cabarrus County District Court. The trial court, sitting without a jury, faced only the issue of whether "the September 9, 1991 amendment to the by-laws of the Cornerstone Condominium Association is valid since the amendment was not recorded at the office of the Register of Deeds within ten (10) days as required by the by-laws." In its judgment the court found that the failure to record the amendment was not fatal to the amendment and ordered that the defendants remove their dog from the premises. From this judgment, defendants appeal.

Johnson, Roberts & Hastings, by James C. Johnson, Jr., for defendants-appellants.

Ferguson & Scarbrough, P.A., by James E. Scarbrough, for plaintiff-appellee.

MCCRODDEN, Judge.

The sole issue we consider is whether the trial court erred in finding that the failure to record the amendment to the association by-laws was not fatal to the amendment. We conclude that the court was in error and reverse its judgment.

The by-laws of the plaintiff association provide, in pertinent part:

10.1 Amendments to these Bylaws may be proposed by the Board of Directors of the Association acting upon a vote of a majority of the Directors.

10.2 In order for such amendment to become effective, it must be approved by an affirmative vote of a majority of the entire membership of the Board of Directors. Thereupon, such amendment or amendments to these Bylaws shall be transcribed, certified by the Secretary of the Association, and a copy thereof *shall be recorded in the Cabarrus County, North Carolina, Public Registry, within ten (10) days from the date on which any amendment has been approved by the Directors and members.* No amendment shall become effective until it is *duly* recorded.

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10.3 Upon the approval and *proper* recording of any amendment, it shall become binding upon all Unit Owners.

(Emphasis added).

Initially, we note that, although the last sentence of Section 10.2 mentions approval of amendment by the Directors *and* the members, the portion of the by-laws included in the record on appeal contains no provision for ratification of any by-law amendments by any unit owners other than the Board of Directors. Thus, it appears that the Cornerstone Board of Directors alone is vested with the power to amend the by-laws.

That being so, we believe that the Board is bound by the procedures established for the exercise of the power to amend the by-laws affecting all members of the association. The language of Section 10.2 ("such amendment . . . *shall* be recorded . . .") and no amendment is to be effective "until it is *duly* recorded") is clearly mandatory. See *In re Trulove*, 54 N.C. App. 218, 222, 282 S.E.2d 544, 547 (1981), *disc. review denied*, 304 N.C. 727, 288 S.E.2d 808 (1982). According to the American Heritage Dictionary, 2d College Edition 429 (1991), the word *duly* means "[i]n a proper manner" and "[a]t the expected time," and, hence, we conclude that "duly recorded" means properly and timely recorded. In this case, the association's failure to record the amendment within ten days rendered the by-law ineffective and not binding on defendants. Consequently, we reverse the judgment of the trial court and remand for entry of judgment in favor of the defendants.

Reversed.

Judge COZORT concurs.

Judge JOHNSON dissents.

Judge JOHNSON dissenting.

I respectfully dissent. I do not believe failing to file the amendment which is the subject of this appeal within the ten day period should render the amendment void. I believe the effect of failing to file the amendment within the ten day period is to replace the effective date of the amendment so that it becomes the date of filing which is outside the ten day period.

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[112 N.C. App. 530 (1993)]

This amendment was adopted on 9 September 1991 at a properly called meeting of the Board of Directors of plaintiff association. The amendment states in pertinent part: "[N]o additional pets may be brought to or kept on the premises by any resident or member after September 9, 1991." By the plain language of the amendment, the Board of Directors intended to adopt an amendment which was to have an effective date of 9 September 1991, yet would not necessarily be filed that same day. The ten day provision in the bylaws, however, gives the Board a definite period of time during which the amendment to the bylaws may be transcribed, certified by the Secretary of the Association, and recorded in the Cabarrus County Public Registry, retaining the earlier effective date. Once outside this ten day window, however, the provision is effective only after being transcribed, certified by the Secretary and recorded.

I would affirm the decision of the trial court.

JAMES W. CRABTREE v. DORIS S. JONES

No. 9226SC1134

(Filed 2 November 1993)

1. Deeds § 78 (NCI4th)— restrictive covenants—enforceability *inter se*

Although restrictive covenants were subject to amendment at any time by written agreement of the grantor and the owner(s) of any lot(s) to which the covenants applied, the restrictive covenants were enforceable *inter se*, that is, by one lot owner against another lot owner, where a statement in the covenants that the restrictions could be enforced by "any lot owner or owners" makes plain the intent of the grantor that the covenants were enforceable *inter se*.

Am Jur 2d, Covenants, Conditions, and Restrictions §§ 277, 297.

2. Deeds § 60 (NCI4th)— restrictive covenant—violation—effect of city zoning ordinance

The trial court erred in refusing to grant summary judgment in plaintiff's favor where it was undisputed that defend-

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ant constructed a second building on her lot in violation of restrictive covenants, and the second building, though it may have been permissible under city zoning laws as an accessory structure, was nevertheless a violation, since zoning ordinances do not diminish the effect of more stringent private restrictive covenants.

**Am Jur 2d, Covenants, Conditions, and Restrictions
§§ 277, 297.**

Appeal by plaintiff from judgment entered 6 August 1992 by Judge Charles C. Lamm, Jr. in Mecklenburg County Superior Court. Heard in the Court of Appeals 7 October 1993.

Plaintiff filed this action on 16 April 1992, to enforce a restrictive covenant against the defendant and enjoin her from completing the construction of a pool house on her property across the street from plaintiff. Superior Court Judge Claude S. Sitton issued a preliminary injunction on 20 May 1992. Both parties moved for summary judgment and after a hearing, the trial court entered an order denying plaintiff's motion, dissolving the injunction and granting defendant summary judgment on the ground that plaintiff was not entitled to enforce any provision of the restrictive covenants against defendant. From this order, plaintiff appeals.

Smathers & Thompson, by James W. Crabtree, for plaintiff-appellant.

Weinstein & Sturges, P.A., by Thomas D. Myrick and James N. Freeman, Jr., for defendant-appellee.

MCCRODDEN, Judge.

The issue underlying the trial court's grant of summary judgment is whether the restrictive covenant agreement on the subject property is enforceable *inter se*, i.e., whether one lot owner may enforce it as against another lot owner.

Plaintiff and defendant own houses in the residential development known as Carmel Estates East in Charlotte, North Carolina. The parties' lots are two of 47 in that subdivision which are subject to a restrictive covenant agreement recorded on 13 March 1962 (the Agreement). The Agreement provides, among other things:

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1. All lots shall be used for residential purposes only and no building shall be erected, placed or permitted to remain on any lot other than one single family dwelling not to exceed two (2) stories in height above ground and a private garage or carport for not more than three cars.

. . . .

3. No dwelling erected on any lot shall cost less than \$25,000.00 based upon costs prevailing on the date these covenants are recorded

4. The enclosed and heated living area shall be not less than 2,000 square feet for the ground floor of a one-story dwelling, not less than 1,600 square feet for the ground floor of a story and a half dwelling or a split-level dwelling, not less than 1,200 square feet for the ground floor and 2,400 square feet total area for a two story dwelling. . . .

. . . .

16. These covenants are to run with the land and shall be binding on all parties and all persons claiming under them

17. These covenants may be enforced by [the grantor] or any lot owner or owners by proceedings at law or in equity against the person or persons violating or attempting to violate any covenant or covenants, either to restrain violation thereof or to recover damages.

. . . .

19. These Restrictive Covenants may be amended from time to time and minor violations thereof may be waived by written agreement of [the grantor] and the then owner or owners of any lot or lots to which said amendments or waivers, if any, shall apply.

[1] Plaintiff presents two arguments based upon two assignments of error. He first argues that the trial court erred in determining that these covenants were not enforceable *inter se*. The court based its conclusion upon "the law of North Carolina as enunciated by the Supreme Court and Court of Appeals in *Humphrey v. Beall*, 215 N.C. 15, 200 S.E. 918 (1939) and *Rosi v. McCoy*, 79 N.C. App. 311, 338 S.E.2d 792, *modified and aff'd*, 319 N.C. 589, 356 S.E.2d 568 (1987)." In this conclusion, the court erred.

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In *Humphrey*, the Supreme Court considered a set of restrictive covenants that were subject to amendment at any time with the mutual consent of the grantor and the then land owner. The Court found that these restrictive covenants were not enforceable *inter se* because the provision allowing the covenants to be amended at any time showed that there was no mutuality of burdens and privileges and there was, therefore, no general plan or scheme of development. *Humphrey*, 215 N.C. at 18-19, 200 S.E. at 920.

Similarly in *Rosi*, the Court of Appeals held that the reservation of the right to amend the restrictive covenants belied the existence of a general plan or scheme of development and rendered the covenants unenforceable except as personal covenants for the benefit of the grantor. 79 N.C. App. at 313, 338 S.E.2d at 794.

Both *Rosi* and *Humphrey*, however, are inapposite. Our Supreme Court recently presented a thorough review and analysis of the law of real covenants and equitable servitudes in *Runyon v. Paley*, 331 N.C. 293, 416 S.E.2d 177 (1992). As stated in *Runyon*, in order to enforce a restrictive covenant in equity, a plaintiff must show that the original covenanting parties intended that the covenant bind the party against whom enforcement is sought. 331 N.C. at 311, 416 S.E.2d at 190. If the plaintiff was not a party to the original covenant, he must show that the covenanting parties intended that he be able to enforce the restrictions. *Id.* To do so, he must present evidence that the covenanting parties intended that he personally benefit from the restrictions, or that the covenanting parties intended that the restrictions benefit land in which the plaintiff holds a present interest. *Id.* "The latter may be shown by evidence of a common scheme of development . . . or of an express statement of intent to benefit property owned by the party seeking enforcement, e.g., *Lamica v. Gerdes*, 270 N.C. 85, 153 S.E.2d 814 (1967)." *Runyon*, 331 N.C. at 311-12, 416 S.E.2d at 190 (citations omitted) (emphasis added). A party seeking to enforce a covenant must show a general scheme of development only when the intent of the covenanting parties is unclear. See *Lamica*, 270 N.C. at 90, 153 S.E.2d at 818.

In this case there was clear evidence of the grantor's intent that the plaintiff's land be benefitted. The statement in the covenants that the restrictions may be enforced by "any lot owner or owners" makes plain the grantor's intent that plaintiff's land be benefitted. When a set of restrictive covenants contains such a clear statement

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of the covenants' intent that the covenants be enforceable *inter se*, we need not reach the issue of whether there was a general scheme of development. Plaintiff, like any other lot owner in the development, is entitled to enforce the restrictive covenants against defendant. Accordingly, we hold that the trial court erred in granting defendant's motion for summary judgment.

[2] Second, plaintiff argues that the trial court erred in dissolving the preliminary injunction and in failing to grant summary judgment in plaintiff's favor and to issue a mandatory permanent injunction requiring the defendant to remove the pool house. Plaintiff asserts that it is undisputed that defendant constructed a second building on her lot in violation of the restrictive covenants. We agree with plaintiff that the trial court should have granted summary judgment in his favor, but we decline to determine the propriety of an injunction.

It is undisputed that defendant constructed a building containing a bedroom, bathroom and kitchen on her lot. Defendant purportedly constructed the pool house as elderly housing, permissible under Charlotte zoning laws as an accessory structure. "[Z]oning ordinances [however] do not diminish the effect of more stringent private restrictive covenants." *Buie v. Johnston*, 53 N.C. App. 97, 100-01, 280 S.E.2d 1, 3 (1981). Defendant built the pool house, a dwelling, in clear violation of the first covenant, allowing only one single-family dwelling on any lot. We hold that the trial court erred in refusing to grant summary judgment in plaintiff's favor.

Plaintiff's further argument, that the trial court erred in not awarding him a mandatory injunction, is not, however, compelling. The trial court, having found that the covenants were not enforceable *inter se*, did not reach the issue of whether a mandatory injunction was appropriate.

A mandatory injunction may be an appropriate remedy to compel the removal or modification of a building erected in violation of a restrictive covenant. *Buie v. Johnston*, 313 N.C. 586, 589, 330 S.E.2d 197, 198 (1985). The issuance of such an injunction, however, "depends upon the equities between the parties." *Ingle v. Stubbins*, 240 N.C. 382, 390, 82 S.E.2d 388, 395 (1954). We believe that such a balancing of equities is clearly within the province of the trial court. Since the trial court did not rule on the propriety of a mandatory injunction, we must remand the case for the court to exercise its discretion and make that determination. Accordingly,

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we reverse the entry of summary judgment in favor of the defendant and remand the case for entry of judgment in plaintiff's favor, with instructions for the court below to fashion an appropriate remedy.

Reversed and remanded.

Judges Johnson and Cozort concur.

MAURICE GILLIAM v. PERDUE FARMS

No. 9210IC967

(Filed 2 November 1993)

**Master and Servant § 69.1 (NCI3d)— workers' compensation—
illiterate, retarded claimant— permanent and total disability—
sufficiency of evidence**

Evidence was sufficient to support the Industrial Commission's conclusion that claimant was permanently and totally disabled where it tended to show that he was an illiterate, mildly retarded, thirty-six-year-old male who had had limited work experience, all of which required lifting, stooping, and standing; claimant suffered injury to his lower back resulting in chronic pain; and experts testified that claimant's tolerance for activity did not appear appropriate for working, that claimant would have difficulty meeting critical vocational demands in the work place, and that claimant was not employable.

Am Jur 2d, Workers' Compensation § 593.

Appeal by defendant from opinion and award entered 21 July 1992 by the Industrial Commission. Heard in the Court of Appeals 14 September 1993.

Williamson, Herrin, Barnhill, Savage & Morano, by Mickey A. Herrin, for defendant-appellant.

Leland Q. Towns for claimant-appellee.

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[112 N.C. App. 535 (1993)]

McCRODDEN, Judge.

The issue presented by this worker's compensation case is whether the Industrial Commission erred in concluding that claimant is permanently and totally disabled, entitling claimant to compensation under N.C. Gen. Stat. § 97-29 (1991).

Our review of an Industrial Commission's award is limited to two questions: (1) whether there was competent evidence before the Commission to support its findings of fact, and (2) whether the findings support the legal conclusions. *Hansel v. Sherman Textiles*, 304 N.C. 44, 49, 283 S.E.2d 101, 104 (1981). The findings of the Industrial Commission are conclusive on appeal when supported by competent evidence even though there may be evidence to support a contrary finding. *Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 595, 290 S.E.2d 682, 684 (1982). Whether a disability exists is a conclusion of law which must be based upon findings of fact supported by competent evidence. *Id.* at 594-95, 290 S.E.2d at 683.

N.C. Gen. Stat. § 97-2(9) (1991) defines "disability" as "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." See *Taylor v. Pardee Hospital*, 83 N.C. App. 385, 389, 350 S.E.2d 148, 151 (1986), *disc. review denied*, 319 N.C. 410, 354 S.E.2d 729 (1987). Our Supreme Court has stated that in order to support a conclusion of disability, the Commission must find: (1) that claimant was incapable after his injury of earning the same wages he had earned before his injury in the same employment, (2) that he was incapable after his injury of earning the same wages he had earned before his injury in any other employment, and (3) that his incapacity to earn was caused by his injury. *Hilliard*, 305 N.C. at 595, 290 S.E.2d at 683. In reviewing the record, we find competent evidence to support the challenged findings of fact which in turn support the Commission's legal conclusion, and therefore affirm the Commission's award.

Claimant is an illiterate, 36 year-old male, with only an eighth grade education. He is mildly mentally retarded and has cognitive defects affecting his memory, concentration, and attention. His work experience has been limited. Prior to working at Perdue Farms, he operated a stationary radial saw and built tobacco barns and pea pickers. Both of these jobs required lifting, prolonged sitting, and standing. On 30 January 1989, claimant, who worked for defend-

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ant employer as a chicken catcher and forklift driver, sustained an injury by accident arising out of and in the course of his employment when he was involved in a vehicular accident while riding as a passenger in a truck on the way to catch chickens.

As a result of his accident, claimant saw a number of medical doctors and vocational consultants. He complained that because of the pain he could not perform his previous job, which required stooping and lifting, and had difficulty lying in bed. Dr. George Miller diagnosed claimant as having cervical and lumbar sprains and assigned to him ratings of 7% permanent partial impairment of the cervical spine and 10% permanent partial impairment of the lumbar spine. Melinda Evans assessed claimant's functional capacity at Pitt County Memorial Hospital beginning 10 November 1989. In her report, Ms. Evans noted that claimant's tolerance for activity did not appear appropriate at that time for either working or a work-hardening program. Judy Sedor, a vocational rehabilitation specialist, determined that claimant's test results placed him in the range of mild mental retardation. Stephen D. Carpenter, a vocational rehabilitation consultant, completed a functional capacity assessment of claimant revealing that claimant is cognitively dysfunctional and appears to be mentally retarded. He testified that, in his opinion, claimant would have difficulty meeting critical vocational demands in the work place and is not employable.

The foregoing evidence was sufficient to support the Full Commission's findings (1) that, due to the injuries to claimant's lower back and the chronic incapacitating pain, claimant "is only capable of less than sedentary work not involving significant lifting, bending and stooping or prolonged standing or sitting," and (2) that there is no such work for "someone of . . . [claimant's] age, education, background and work experience."

Defendant supports his contention that plaintiff is capable of returning to work and is able to obtain employment by referring to statements made by Ms. Sedor, who testified that there are positions available in the job market which plaintiff could obtain and would be capable of performing. Offsetting that testimony, however, there was competent evidence that, given claimant's age, education, and experience, there is no sedentary work which would accommodate his inability to lift, bend, stoop, or be in prolonged sitting or standing positions.

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The Industrial Commission found as fact that "as a result of his permanent back injury plaintiff is not able to return to his regular chicken catching job." The Commission further found that because of "plaintiff's age, education, background, and work experience with the physical limitations that he has from his chronic pain," plaintiff will not be able to obtain employment. These findings, supported by competent evidence, satisfy the three-part test for disability set out in *Hilliard*, and, despite competent evidence to the contrary, are conclusive on appeal. *Hilliard*, 305 N.C. at 595, 290 S.E.2d at 684.

Finally, we address *ex mero motu* the issue of claimant's counsel's violation of the Rules of Appellate Procedure. In gross violation of N.C.R. App. P. 28(d), counsel attached to claimant's brief lengthy appendices comprised of two complete depositions, a vocational rehabilitation report, and all of the trial exhibits. In a case in which the outcome depended upon the identification of competent evidence supportive of the award in his client's favor, counsel further compounded the problem by referring to a whole appendix, rather than the particular pages that might contain the pertinent evidence. In our discretion, pursuant to Rule 35 of the Appellate Rules, we assess that portion of the costs of the appeal attributable to claimant's appendices to his brief against his counsel, with defendant to bear the remainder of the costs of the appeal.

In the appeal, we hold that there was competent evidence supporting the Industrial Commission's findings of fact and that these findings support the Commission's legal conclusion. We affirm the award.

Affirmed.

Judges JOHNSON and COZORT concur.

IN RE APPEAL OF CONE MILLS CORP.

[112 N.C. App. 539 (1993)]

IN THE MATTER OF THE APPEAL OF CONE MILLS CORPORATION

No. 9210PTC1053

(Filed 2 November 1993)

Taxation § 25 (NCI3d)— textile plant closed—equipment and machinery sold—property subject to ad valorem taxation

Where taxpayer closed one of its textile manufacturing plants and sold the equipment and machinery, the equipment and machinery were not inventory held for sale in the regular course of business by a wholesale merchant, and the property therefore was not excluded from ad valorem taxation.

Am Jur 2d, State and Local Taxation §§ 354-361.

Appeal by taxpayer from a final decision of the North Carolina Property Tax Commission denying taxpayer's application for exclusion of personal property from *ad valorem* taxation. Heard in the Court of Appeals 30 September 1993.

Taxpayer, Cone Mills Corporation, is engaged in a variety of business activities in North Carolina, including the manufacture of textiles. Taxpayer's sales of textile products generate annual gross revenues in the range of \$500 million to \$750 million. In November 1988, taxpayer closed one of its plants, and the textile manufacturing equipment and machinery, which was no longer in use at the plant, was sold by the taxpayer.

On 21 March 1990, the Guilford County Board of Equalization and Review denied taxpayer's request to classify the personal property as inventory and imposed an *ad valorem* tax on the sale of the property. Taxpayer appealed to the Property Tax Commission which affirmed the decision of the Guilford County Board of Equalization and Review. Taxpayer appealed.

Brooks, Pierce, McLendon, Humphrey & Leonard, by Edward C. Winslow III and Robert J. King III, for the taxpayer-appellant.

Guilford County Attorney's Office, by County Attorney Jonathan V. Maxwell and Deputy County Attorney Gregory L. Gorham, for the taxing authority-appellee.

IN THE COURT OF APPEALS
IN RE APPEAL OF CONE MILLS CORP.
[112 N.C. App. 539 (1993)]

WELLS, Judge.

According to N.C. Gen. Stat. § 105-274:

(a) All property, real and personal, within the jurisdiction of the State shall be subject to taxation unless it is:

- (1) Excluded from the tax base by a statute of statewide application enacted under the classification power accorded the General Assembly by Article V, § 2(2), of the North Carolina Constitution, or
- (2) Exempted from taxation by the Constitution or by a statute of statewide application enacted under the authority granted the General Assembly by Article V, § 2(3), of the North Carolina Constitution.

N.C. Gen. Stat. § 105-275(34) designates inventories “owned by retail and wholesale merchants” as a special class of property which “shall not be listed, appraised, assessed, or taxed.” Inventories are defined as “goods held for sale in the regular course of business by manufacturers, retail and wholesale merchants, and contractors.” N.C. Gen. Stat. § 105-273(8a). Wholesale merchant is defined as

a taxpayer who is regularly engaged in the sale of tangible personal property, acquired by a means other than manufacture, processing, or producing by the merchant, to other retail or wholesale merchants for resale or to manufacturers for use as ingredient or component parts of articles being manufactured for sale.

N.C. Gen. Stat. § 105-273(19).

Taxpayer argues that because it sells its used machinery and equipment from time to time the sale of its machinery and equipment meets all the requirements set forth above and is therefore excluded from taxation. We do not agree.

The scope of appellate review of cases from the Property Tax Commission is set by N.C. Gen. Stat. § 105-345.2, which provides in pertinent part:

(b) So far as necessary to the decision and where presented, the court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning and applicability of the terms of any Commission action. The court may affirm or reverse the decision of the Commis-

IN RE APPEAL OF CONE MILLS CORP.

[112 N.C. App. 539 (1993)]

sion, declare the same null and void, or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the appellants have been prejudiced because the Commission's findings, inferences, conclusions or decisions are:

. . .

- (4) Affected by other errors of law; or
- (5) Unsupported by competent, material and substantial evidence in view of the entire record as submitted; or
- (6) Arbitrary or capricious.

(c) In making the foregoing determinations, the court shall review the whole record or such portions thereof as may be cited by any party and due account shall be taken of the rule of prejudicial error.

This statutorily mandated standard of review is known as the "whole record test." In applying this standard of review, this Court is not permitted to replace the Property Tax Commission's judgment with its own judgment even when there are two reasonably conflicting views. *In re Appeal of Perry-Griffin Foundation*, 108 N.C. App. 383, 424 S.E.2d 212, *rev. denied*, 333 N.C. 533, 429 S.E.2d 561 (1993). "The whole record test is not a tool of judicial intrusion; instead it merely gives a reviewing court the capability to determine whether an administrative decision has a rational basis in the evidence." *Rainbow Springs Partnership v. County of Macon*, 79 N.C. App. 335, 339 S.E.2d 681, *rev. denied*, 316 N.C. 734, 345 S.E.2d 392 (1986) (*quoting In re Rogers*, 297 N.C. 48, 253 S.E.2d 912 (1979)). In reviewing whether the whole record fully supports the Commission's decision, this Court must evaluate whether the Commission's decision is supported by substantial evidence. If substantial evidence is found, this Court cannot overturn the Property Tax Commission's decision. *Id.*

The dispositive question on appeal is whether the taxpayer is a wholesale merchant of inventories as defined by N.C. Gen. Stat. § 105-273(8a) and (19). The statutory language of The Machinery Act provides us with the clearest guidance in resolving this question.

To resolve this question we ask: What was the primary purpose for which taxpayer acquired the property? If the taxpayer

IN RE APPEAL OF CONE MILLS CORP.

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acquired the equipment and machinery for the primary purpose of using it in the manufacture of textiles, then the equipment and machinery are not goods held for sale in the regular course of business by a wholesale merchant. If the taxpayer acquired the property for the primary purpose of resale, then the property would be excluded from *ad valorem* taxation.

Taxpayer admits that the primary purpose for which it purchased the machinery and equipment was for use in its manufacture of textiles. Only when the taxpayer no longer used the machinery and equipment in its textile business did taxpayer offer it for sale. Taxpayer's annual revenues generated from the sale of used equipment and machinery totaled approximately \$200,000, whereas taxpayer's annual gross revenues from the manufacture of textiles totaled approximately \$500 million.

After reviewing the whole record, we conclude that the Property Tax Commission's decision was supported by substantial evidence. Taxpayer acquired the property primarily for use in its manufacture of textiles and only held the goods for sale after the property was no longer useful in taxpayer's textile business. The equipment and machinery at issue were not inventory held for sale in the regular course of business by a wholesale merchant. Consequently, the property is not excluded from *ad valorem* taxation and the decision of the Property Tax Commission is

Affirmed.

Judges LEWIS and MARTIN concur.

CASES REPORTED WITHOUT PUBLISHED OPINION
FILED 2 NOVEMBER 1993

BOWDEN v. LATTA No. 9314SC420	Durham (91CVS04270)	Dismissed
COUNTY OF MOORE v. PINEHURST AREA REALTY No. 9220SC587	Moore (89CVS1035)	Affirmed
CREWS v. CREWS No. 929DC1090	Granville (92CVD377)	Reversed & Remanded
HARPER v. FOWLER No. 9210SC1219	Wake (89CVS02628)	Affirmed in part, reversed in part and remanded
HAZELWOOD v. BAILEY No. 9317SC579	Rockingham (92CVS788)	Affirmed
HENDERSON v. INVESTORS CONSOLIDATED INS. CO. No. 9223SC1022	Yadkin (91CVS360)	Affirmed
HOLDEN v. TRANSYLVANIA COUNTY HUMANE SOCIETY No. 9229DC592	Transylvania (91CVD150)	No Error
JACKSON v. EASTER No. 9316DC121	Robeson (90CVD0066)	Affirmed in part, reversed & remanded in part
LACY v. SITTON No. 9330SC581	Jackson (92CVS419)	Affirmed
LEMONS v. GAS HOUSE CO. No. 9215SC1145	Alamance (91CVS859)	Affirmed
LOHR v. LOHR No. 9322DC399	Davidson (92CVD01174)	Affirmed
LOWERY v. C & J TRANSPORTATION No. 9310IC460	Ind. Comm. (859350)	Affirmed
MOORE v. SHERRILL No. 9310SC347	Wake (91CVS4414)	Affirmed
NELSON v. HALE No. 923DC299	Pitt (90CVD1860)	No Error

PARKER v. PINWOOD MANOR HOMES No. 934SC198	Onslow (91CVS611)	Affirmed
PINNIX v. CITY OF HIGH POINT No. 9318SC306	Guilford (91CVS2683)	Affirmed
RUSSELL v. CHAMPION INTERNATIONAL No. 9330SC588	Haywood (92CVS713)	Dismissed
SAMONAS v. CRUMLEY No. 933SC554	Carteret (90CVS870)	Affirmed
SANDAVIS PROPERTIES, INC. v. MCGRAW No. 9220DC1095	Moore (91CVD00820)	Dismissed
SHOOK v. SHOOK No. 9329DC563	McDowell (91CVD257)	Vacated
STATE v. ANDERSON No. 9320SC545	Union (92CRS04403) (92CRS11397) (92CRS11398) (93CRS00483)	No Error
STATE v. ANDERSON No. 9320SC547	Union (93CRS0482) (93CRS0484) (93CRS1061)	No Error
STATE v. BARRETT No. 928SC428	Lenoir (91CRS6588) (91CRS6589) (91CRS6590)	No Error
STATE v. BAUCOM No. 928SC40	Wayne (89CRS13971) (89CRS13975) (89CRS13978)	No Error
STATE v. BEST No. 9328SC475	Buncombe (92CRS2351) (92CRS2352) (92CRS2353) (92CRS2354) (92CRS2355) (92CRS3493) (92CRS5348) (92CRS5349) (92CRS5350) (92CRS5351)	Dismissed

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	(92CRS5357)	
	(92CRS5358)	
	(92CRS54742)	
	(92CRS54743)	
	(92CRS54744)	
	(92CRS54745)	
STATE v. BROWN No. 9323SC469	Yadkin (92CRS353) (92CRS354)	No Error
STATE v. CHAMBERS No. 9318SC642	Guilford (91CRS20068)	New Trial
STATE v. CLARK No. 9310SC377	Wake (91CRS2908) (91CRS2909)	No Error
STATE v. CROMARTIE No. 935SC95	New Hanover (92CRS12763)	No Error
STATE v. DAVIS No. 932SC470	Beaufort (92CRS5938)	Affirmed
STATE v. ERWIN No. 9318SC571	Guilford (92CRS43661) (92CRS43662) (92CRS43663)	No Error
STATE v. EVANS No. 9326SC512	Mecklenburg (92CRS15070)	No Error
STATE v. FARRIS No. 938SC591	Lenoir (91CRS12080) (91CRS12081)	No Error
STATE v. GILLIAM No. 9328SC510	Buncombe (92CRS57040)	Dismissed
STATE v. HODGE No. 9210SC1287	Wake (92CRS1436) (92CRS6646)	No Error
STATE v. HORTON No. 9318SC506	Guilford (92CRS20555) (92CRS44372)	No Error
STATE v. JACKSON No. 9318SC366	Guilford (88CRS58534)	No Error

STATE v. MONTGOMERY No. 9318SC471	Guilford (92CRS37392)	No Error
STATE v. NELSON No. 9318SC437	Guilford (91CRS63948)	No Error
STATE v. OSBORNE No. 9216SC1191	Robeson (91CRS3267)	No Error
STATE v. PATTON No. 9225SC1076	Caldwell (90CRS9820) (90CRS9821) (90CRS9822) (90CRS9823) (90CRS9324) (90CRS9325) (90CRS9326) (90CRS9327)	Sentence vacated & case remanded for resentencing
STATE v. PEREZ No. 9312SC472	Cumberland (91CRS4328) (91CRS4329) (91CRS4330)	No Error
STATE v. RAMSEY No. 9327SC528	Cleveland (89CRS7180)	No Error
STATE v. RAMSEY No. 9326SC530	Mecklenburg (91CRS71276)	No Error
STATE v. SHANKS No. 9310SC271	Wake (92CRS35379) (92CRS35380)	No Error
STATE v. SUGGS No. 933SC494	Pitt (91CRS10608)	No Error
STATE v. SUTTLE No. 9328SC442	Buncombe (92CRS63221) (92CRS63222) (92CRS63223)	No Error
STATE v. THOMAS No. 938SC574	Lenoir (92CRS6516)	No Error
STATE v. WALKER No. 9310SC160	Wake (92CRS49694) (92CRS49695) (92CRS62442)	No Error
STATE v. WHEELER No. 9328SC466	Buncombe (92CRS62505)	No Error
STATE EX REL. RUTLAND v. ROTH No. 9312DC61	Cumberland (86CVD3914)	Vacated

TOMBLIN v. FIRST
UNION NATIONAL BANK
No. 9229SC365

Rutherford
(90CVS369)

Affirmed

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[112 N.C. App. 548 (1993)]

**HERMAN BEST v. DUKE UNIVERSITY, TRADING AND DOING BUSINESS AS DUKE
UNIVERSITY HOSPITAL AND DUKE MEDICAL CENTER**

No. 9214SC1016

(Filed 16 November 1993)

1. Malicious Prosecution § 17 (NCI4th)— earlier trespass charge voluntarily dismissed by State—lack of probable cause—inference of malice—directed verdict and judgment n.o.v. properly denied

In a malicious prosecution action where the State had earlier voluntarily dismissed a trespass charge against plaintiff and the jury had returned a verdict of not guilty on the larceny charge, the trial court properly denied defendant's motions for directed verdict and judgment n.o.v. and did not abuse its discretion in denying defendant's motion for new trial, since a reasonable mind might infer malice from the lack of probable cause evidenced by the dismissal of the trespass charge.

Am Jur 2d, Malicious Prosecution §§ 139-190.**2. Negligence § 6 (NCI4th)— officers' stop and subsequent arrest of plaintiff—no negligent infliction of emotional distress**

The trial court did not err in granting defendant's motion for judgment n.o.v. on the issue of negligent infliction of emotional distress, since the facts in this case did not present evidence from which a reasonable mind might conclude that a Duke Public Safety officer who arrested plaintiff conducted himself differently from a reasonable person in the discharge of official duties of a like nature under like circumstances, and plaintiff thus failed to present substantial evidence of negligent conduct, the first element of his claim for negligent infliction of emotional distress.

Am Jur 2d, Fright, Shock, and Mental Disturbance § 2.**3. Trespass § 2 (NCI3d)— officers' stop and subsequent arrest of plaintiff—no intentional infliction of emotional distress**

The trial court did not err in directing verdict for defendant in plaintiff's action for intentional infliction of emotional distress, since the officers' conduct in stopping and later arresting plaintiff could not reasonably be regarded as extreme

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or outrageous, and there was no evidence that the officers intended to cause plaintiff severe emotional distress.

Am Jur 2d, Fright, Shock, and Mental Disturbance § 2.

4. Damages § 127 (NCI4th) — officers' stop and subsequent arrest of plaintiff—no evidence of malice—directed verdict on punitive damages claim proper

The trial court did not err in granting defendant's motion for directed verdict on the issue of punitive damages where a reasonable mind would not accept the evidence as adequate to show that the officers' conduct in stopping and later arresting plaintiff amounted to the actual malice necessary to sustain a claim for punitive damages.

Am Jur 2d, Damages § 731 et seq.

Judge ORR concurring in the result only.

Appeal by plaintiff and defendant from judgment entered 22 May 1992 in Durham County Superior Court by Judge A. Leon Stanback, Jr. Heard in the Court of Appeals 17 September 1993.

Robert R. Seidel and R. Marie Sides for plaintiff-appellant/appellee.

Patterson, Dilthey, Clay & Bryson, by Robert M. Clay, and Cranfill, Sumner & Hartzog, by Theodore B. Smyth and Kari Lynn Russwurm, for defendant-appellee/appellant.

GREENE, Judge.

Herman Best (plaintiff) brought the instant action against Duke University (defendant) and asserted causes of action for malicious prosecution, intentional infliction of emotional distress, negligent infliction of emotional distress, and punitive damages. At the close of the plaintiff's evidence, defendant moved for directed verdict as to all of plaintiff's claims. The motions were granted for intentional infliction of emotional distress and punitive damages. The claims for malicious prosecution and negligent infliction of emotional distress were submitted to the jury which rendered a verdict against defendant on both claims. On 28 February 1992, the jury awarded plaintiff \$40,000 in damages for malicious prosecution and \$60,000 in damages for negligent infliction of emotional distress. On 9 March 1992, defendant filed motions for judgment notwith-

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standing the verdict and new trial. The trial court denied defendant's motions as to the malicious prosecution claim and granted defendant's motion for judgment notwithstanding the verdict as to negligent infliction of emotional distress. The court additionally ruled that if its granting of defendant's motion for judgment notwithstanding the verdict was overturned on appeal, defendant would be entitled to a new trial. Defendant appeals from the trial court's denial of defendant's motions as to the malicious prosecution claim. Plaintiff appeals from the trial court's granting of defendant's motions as to the remaining three claims.

The evidence in the light most favorable to the plaintiff is as follows: Around 3:00 or 3:30 a.m. on 26 August 1989, plaintiff was having trouble sleeping and decided to go get something to eat. While out, he decided to take his patio furniture, three chairs and a table all blue in color, which he had promised to give to a friend.

On the way to his friend's house around 4:30 or 5:00 a.m., plaintiff, realizing he was going in the wrong direction, took a right onto Faculty Club Drive, pulled into a gravel parking lot, and turned around. Plaintiff had his lights on the entire time, and the maneuver took less than a minute. As plaintiff was about to pull onto Science Drive, he noticed a blue car which passed by slowly with the brake lights shining and the driver looking at plaintiff. Plaintiff was suspicious of the car because it did not have North Carolina tags and turned in the opposite direction the car was heading. Plaintiff, hoping to find some people, drove to the Washington Duke Hotel. Seeing no one, plaintiff started to leave when he noticed the blue car pulled at an angle across Science Drive in front of him. A man wearing a dark blazer, a dark pair of pants, and a dress shirt was standing outside the car and waving his arms. Plaintiff was scared and drove by the car and continued onto Highway 751. The car, flashing its headlights, followed plaintiff onto 751 and then onto Erwin Road. The car pulled up beside plaintiff, and the driver rolled down his passenger window and showed plaintiff what appeared to be a badge. Plaintiff then saw a Durham police car approaching and pulled over.

The blue car and the police car pulled in behind plaintiff, and Detective McDonald Vick (Vick), the man driving the blue car, approached plaintiff's car and asked plaintiff what he was doing out at such a late hour. Plaintiff explained that he was taking

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furniture to a friend's house. When asked if he had stolen the furniture, he replied no, that it was his.

At this point, Officer Steven Russell (Russell) of Duke Public Safety arrived and after speaking with Vick, questioned plaintiff. With a flashlight, Russell looked at the furniture through the windows of plaintiff's car and checked it for Duke University ID stickers. Russell sent another officer, Officer Schwab (Schwab), to check the Duke University Faculty Club to see if any furniture was missing. While Schwab was checking the Faculty Club, the plaintiff and Russell discovered they knew each other since Russell occasionally patrols the emergency room at Duke Hospital where plaintiff worked. After they carried on a twenty-five to thirty minute conversation, Schwab returned and said he did not see anything missing from the Faculty Club. The officers told plaintiff he was free to go. Plaintiff then went to his friend's house and assembled the furniture.

Upon returning to work at 7:00 p.m. on 26 August 1989, Russell read a larceny report from Duke Faculty Club. The report described the stolen property as two tables and seven chairs, all gray in color, and did not say anything as to style, design, or construction. After reading the report, Russell, without any further investigation, obtained from the magistrate warrants against plaintiff for felony larceny and second-degree trespass. Russell and Schwab, one of them wearing a gun, went to plaintiff's place of employment, Duke University Medical Center, and arrested plaintiff. Russell asked plaintiff if he needed to get anything before they left, and plaintiff said yes. The officers followed plaintiff through his work area as he went to get his belongings. The officers then led him out a service door past several co-workers and handcuffed him in view of the co-workers and put him in a Duke Public Safety car. Plaintiff testified he was stunned, embarrassed, and very humiliated.

As a result of his arrest, plaintiff was suspended without pay and eventually fired. Plaintiff testified that he was overwhelmed by the course of events and that it was the worst thing that ever happened to him. Plaintiff eventually contacted and began treatment with Dr. Carolyn Burgess (Burgess), a psychologist. Burgess testified that plaintiff had multiple things happening to him which caused him anguish and depression. The worst occurrence was being arrested and losing his job because the experience destroyed his self-esteem. She testified he experienced helplessness and despair

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and was experiencing "dwindle," which was defined as experiencing the maximum amount of stress. Because he could no longer afford treatment, plaintiff only visited Burgess six times, even though Burgess felt he needed extended treatment.

Plaintiff pled not guilty to both charges at his criminal trial. The State took a voluntary dismissal as to the trespass charge "at the close of the State's evidence." Plaintiff was found not guilty as to the larceny charge.

The issues presented are whether the trial court erred in: (I) denying defendant's motions for directed verdict, judgment notwithstanding the verdict, and new trial as to malicious prosecution; (II) granting defendant's motion for judgment notwithstanding the verdict as to the claim of negligent infliction of emotional distress and directing that if the judgment notwithstanding the verdict is reversed on appeal, then defendant shall receive a new trial; (III) granting defendant's motion for directed verdict as to the claim of intentional infliction of emotional distress; and (IV) granting defendant's motion for directed verdict as to the claim of punitive damages.

I

MALICIOUS PROSECUTION

[1] Defendant contends that it was error for the trial court to deny its motions for directed verdict, judgment notwithstanding the verdict, and new trial as to the issue of malicious prosecution because there was not sufficient evidence of lack of probable cause and malice. We disagree.

In a malicious prosecution claim, the plaintiff must show: (1) initiation by the defendant of an earlier proceeding; (2) lack of probable cause for such initiation; (3) malice, either actual or implied; (4) termination of the earlier proceeding in favor of the plaintiff. *Jones v. Gwynne*, 312 N.C. 393, 397, 323 S.E.2d 9, 11 (1984). In the instant case, the existence of the first and fourth elements is undisputed; therefore, the question is whether there was substantial evidence of malice and lack of probable cause presented at trial. *See Hines v. Arnold*, 103 N.C. App. 31, 34, 404 S.E.2d 179, 181 (1991) (in deciding motion for directed verdict, if non-movant presents substantial evidence, court must deny motion). Substantial evidence is such relevant evidence as a reasonable mind might

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accept as adequate to support a conclusion. *Id.*; see *Moon v. Bostian Heights Volunteer Fire Dept.*, 97 N.C. App. 110, 111, 387 S.E.2d 225, 226 (1990) (standards for deciding motion for judgment notwithstanding the verdict same as those for directed verdict).

Probable cause is defined "as the existence of such facts and circumstances, known to him at the time, as would induce a reasonable man to commence a prosecution." *Pitts v. Village Inn Pizza, Inc.*, 296 N.C. 81, 87, 249 S.E.2d 375, 379 (1978). A plaintiff makes a prima facie showing of the absence of probable cause by evidence of a voluntary dismissal of the prosecution by the State with no reason assigned for the dismissal. *Id.*; but see *W. Page Keeton et al, Prosser & Keeton on the Law of Torts* § 119, at 881 (5th ed. 1984) (usually, abandonment by public prosecutor is not, standing alone, prima facie evidence that probable cause is lacking). In determining the effect of a voluntary dismissal by the State, the reasons for the entry of dismissal should be taken into account. See *Exxon Corp. v. Kelly*, 281 Md. 689, 695, 381 A.2d 1146, 1150 (1978) (evidentiary effect of *nolle prosequi* depends on circumstances of entry).

At plaintiff's criminal trial, the State voluntarily dismissed the trespass charge, and the jury returned a verdict of not guilty on the larceny charge. Looking at the evidence in the light most favorable to plaintiff, *Hitchcock v. Cullerton*, 82 N.C. App. 296, 297, 346 S.E.2d 215, 217 (1986), the reason for the State's dismissal of the trespass charge was never established. Consequently, the voluntary dismissal of the trespass charge is prima facie evidence of the absence of probable cause under *Pitt*, and a reasonable mind might accept this dismissal as adequate to support a conclusion of lack of probable cause.

Plaintiff must also show substantial evidence of either express or implied malice, *Pitts*, 296 N.C. at 86-87, 249 S.E.2d at 379, which is defined as a wrongful act intentionally done. *Stancill v. Underwood*, 188 N.C. 475, 478, 124 S.E. 845, 847 (1924). Malice may be inferred from proof that defendant lacked probable cause in initiating the proceedings. *Pitts*, 296 N.C. at 86-87, 249 S.E.2d at 379. Since a reasonable mind might infer malice from the lack of probable cause evidenced by the dismissal of the trespass charge, the trial court properly denied the motions for directed verdict and judgment notwithstanding the verdict. Additionally, there was no abuse of discretion by the trial court in denying the motion for new trial.

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Blow v. Shaughnessy, 88 N.C. App. 484, 494, 364 S.E.2d 444, 449 (1988) (trial court's decision on motion for new trial not reviewable absent manifest abuse of discretion).

II

NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS

[2] Plaintiff contends that it was error for the trial court to grant defendant's motion for judgment notwithstanding the verdict on the issue of negligent infliction of emotional distress and in directing that if the judgment notwithstanding the verdict is reversed on appeal then defendant shall receive a new trial. We disagree.

To survive a motion for directed verdict on a claim for negligent infliction of emotional distress, the plaintiff must show evidence a reasonable mind might accept as adequate to support a finding of each of the following: (1) the defendant negligently engaged in conduct; (2) it was reasonably foreseeable that such conduct would cause the plaintiff severe emotional distress; and (3) the conduct did in fact cause the plaintiff severe emotional distress. *Johnson v. Ruark Obstetrics & Gynecology Assoc.*, 327 N.C. 283, 304, 395 S.E.2d 85, 97, *reh'g denied*, 327 N.C. 644, 399 S.E.2d 133 (1990). For a law enforcement officer to be held negligent, the standard is that care a reasonable and prudent person in the discharge of official duties of a like nature under like circumstances should exercise. *State v. Flaherty*, 55 N.C. App. 14, 23, 284 S.E.2d 565, 572 (1981).

The uncontroverted evidence is that in the early morning hours of 26 August 1989, Vick noticed plaintiff driving in the vicinity of the Faculty Club and the Washington-Duke Hotel. Vick attempted to stop plaintiff; however, he drove by Vick who pursued him. Plaintiff stopped after Vick flashed what appeared to be a badge and the Durham Police had arrived. The officers, including Russell, noticed patio furniture in plaintiff's car. Plaintiff was allowed to leave when it could not be determined that any furniture had been taken from the Faculty Club.

Later that evening, Russell learned that patio furniture was missing from the Faculty Club. Subsequently, Russell obtained a warrant from a magistrate based on Vick's report placing plaintiff in the area of the Faculty Club around 4:30 or 5:00 a.m. and Russell's personal observation in plaintiff's car of furniture similar to the property described as stolen from the Faculty Club on 26 August

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1989. Russell and another officer, one of them wearing a gun, went to plaintiff's place of employment and arrested him. Although Russell testified that "it's in the officer's discretion" whether to handcuff someone when making an arrest and although Russell knew plaintiff and knew where he worked, Russell handcuffed plaintiff and put him in the back seat of a Duke Public Safety Car while some of plaintiff's co-workers looked on. Plaintiff underwent treatment with a psychologist who testified that plaintiff's experiences with the course of events left him with feelings of depression, anguish, and despair.

The facts in this case do not present evidence from which a reasonable mind might conclude Russell conducted himself differently than a reasonable person in the discharge of official duties of a like nature under like circumstances. Because plaintiff failed to present substantial evidence of negligent conduct, the first element of his claim for negligent infliction of emotional distress, we hold that the trial court did not err in granting defendant's motion for judgment notwithstanding the verdict. Therefore, it is unnecessary to address the trial court's order that if the judgment notwithstanding the verdict is reversed on appeal, defendant shall receive a new trial.

III

INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

[3] Plaintiff further contends that a reasonable mind might find plaintiff's evidence adequate to support a conclusion of intentional infliction of emotional distress. We disagree.

In order to survive a directed verdict motion for intentional infliction of emotional distress, the plaintiff must show substantial evidence of (1) extreme and outrageous conduct by the defendant (2) which is intended to and does in fact cause (3) severe emotional distress to the plaintiff. *Waddle v. Sparks*, 331 N.C. 73, 82, 414 S.E.2d 22, 27 (1992). Whether or not conduct may reasonably be regarded as extreme and outrageous is initially a question of law for the court. *Briggs v. Rosenthal*, 73 N.C. App. 672, 676, 327 S.E.2d 308, 311, cert. denied, 314 N.C. 114, 332 S.E.2d 479 (1985).

In order for conduct to give rise to liability for intentional infliction of emotional distress, it must be "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable

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in a civilized community.” *Id.* at 677, 327 S.E.2d at 311; *Restatement (Second) of Torts* § 46 cmt. d (1989). We hold, after reviewing the officers’ conduct in stopping and later arresting plaintiff, that such conduct may not be reasonably regarded as extreme or outrageous. Furthermore, there was no evidence that the officers intended to cause the plaintiff severe emotional distress. Therefore, it was not error to grant defendant’s motion for directed verdict.

IV

PUNITIVE DAMAGES

[4] Plaintiff’s final contention is that it was error for the trial court to grant defendant’s directed verdict motion as to punitive damages because plaintiff presented substantial evidence on that issue. We disagree.

To be entitled to punitive damages, plaintiff, beyond establishing cause of action, must also show that a reasonable mind might find evidence adequate to support a conclusion of aggravating circumstances such as malicious, wanton, and reckless injury. *Hawkins v. Hawkins*, 101 N.C. App. 529, 534, 400 S.E.2d 472, 475, *disc. rev. allowed*, 329 N.C. 496, 407 S.E.2d 533 (1991), *aff’d*, 331 N.C. 743, 417 S.E.2d 447 (1992). In order to recover punitive damages in a malicious prosecution case, the plaintiff must show he was wrongfully prosecuted from actual malice, defined as “ill-will, spite, or desire for revenge, or under circumstances of insult, rudeness or oppression, or in a manner evidencing a reckless and wanton disregard of plaintiff’s rights.” *Williams v. Kuppenheimer Mfg. Co.*, 105 N.C. App. 198, 202-03, 412 S.E.2d 897, 901 (1992). A reasonable mind would not accept the evidence as adequate to show that the officers’ conduct amounted to the actual malice necessary to sustain a claim for punitive damages. Therefore, the trial court did not err in granting defendant’s motion for directed verdict as to the issue of punitive damages.

No error.

Judge EAGLES concurs.

Judge ORR concurs in the result with separate opinion.

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[112 N.C. App. 557 (1993)]

Judge ORR concurring in the result only.

I am compelled by the referenced precedent in this case to concur in the result affirming the trial court's denial of defendant's motion for a directed verdict on the issue of malicious prosecution. As I understand the cited authority, a malicious prosecution case is jury bound by introduction of evidence that an unexplained dismissal was taken in a criminal prosecution. The dismissal operates as a "favorable termination" of the action for a plaintiff. *Jones v. Gwynne*, 312 N.C. 393, 323 S.E.2d 9 (1984). "Lack of probable cause" is *prima facie* established thereafter by the voluntary dismissal without explanation. *Pitts v. Village Inn Pizza, Inc.*, 296 N.C. 81, 249 S.E.2d 375 (1978). Next, "malice" may be inferred from proof that the defendant lacked probable cause in initiating the proceedings. *Pitts, supra*.

Therefore, such a "bootstrap" process means that every dismissal of a criminal action without explanation opens the door to a malicious prosecution case and gets the case to the jury on the mere fact that a dismissal without explanation has taken place. That appears to be the law as it now stands, but the implication of such a standard in light of our overcrowded criminal dockets should prompt a reconsideration of this question.

CATAWBA MEMORIAL HOSPITAL, PETITIONER-PLAINTIFF v. NORTH
CAROLINA DEPARTMENT OF HUMAN RESOURCES, RESPONDENT-
DEFENDANT AND AMI FRYE REGIONAL MEDICAL CENTER,
INTERVENOR-RESPONDENT-DEFENDANT

No. 9210SC821

(Filed 16 November 1993)

1. Administrative Law and Procedure § 47 (NC14th)— request for declaratory ruling—prior agency decision determining same issues—good cause for denial of request

Good cause exists for denial of a request for a declaratory ruling where the denial is based on the existence of a prior agency ruling which necessarily required an interpretation of the same statute which is the subject of the request for declaratory ruling. Therefore, petitioner's request for a declaratory ruling was properly denied where the declaratory

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ruling would require the agency to determine the same issue determined in the contested case hearing as to whether former N.C.G.S. § 131E-176(16)f applied to petitioner's proposed open-heart surgery facility and therefore whether the annual operating expenses of the facility would equal or exceed one million dollars, thus making it a new institutional health service and requiring it to obtain a Certificate of Need. N.C.G.S. § 150B-4(a).

Am Jur 2d, Administrative Law § 465.

- 2. Administrative Law and Procedure § 54 (NCI4th); Hospitals and Medical Facilities or Institutions § 16 (NCI4th)— certificate of need required by final agency decision— appeal to superior court— improper forum**

The superior court lacked jurisdiction to enter an order reversing the final decision of the DHR requiring petitioner to obtain a certificate of need prior to opening a new open-heart surgery facility, since petitioner's appeal to the superior court sought review only of DHR's refusal to issue a declaratory ruling in response to petitioner's request, and N.C.G.S. § 131E-188, which governs appeals from final agency decisions regarding the issuance of a CON, provides that such appeals are to be filed in the Court of Appeals, not the superior court.

Am Jur 2d, Administrative Law § 560; Hospitals and Asylums § 3 et seq.

- 3. Administrative Law and Procedure § 47 (NCI4th)— requirement of CON prior to offering service— final agency decision— res judicata— complaint for declaratory judgment properly dismissed**

The final agency decision which determined that petitioner's operating expenses for the first three years for an open-heart surgery facility would exceed one million dollars and that petitioner was therefore required to obtain a CON was a judicial decision which barred, as *res judicata*, petitioner's complaint for a declaratory ruling as to the same issues, and the superior court's dismissal of petitioner's declaratory ruling complaint was therefore proper.

Am Jur 2d, Administrative Law § 465.

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[112 N.C. App. 557 (1993)]

Appeal by all parties from order entered 3 March 1992, as amended 4 March 1992, by Judge Donald W. Stephens in Wake County Superior Court. Heard in the Court of Appeals 16 June 1993.

On 14 February 1990, petitioner Catawba Hospital (hereinafter Catawba) wrote respondent North Carolina Department of Human Resources (hereinafter the Agency) concerning Catawba's plans to develop an open heart surgery facility. The purpose of Catawba's letter to the Agency was to obtain a determination and affirmation that the hospital would not require a certificate of need (hereinafter CON) before commencing development of the new surgical facility.

G.S. § 131E-178 requires issuance of a CON prior to construction or operation of a new health care facility where the capital expenditure for the new service will exceed \$2,000,000, G.S. § 131E-176(16)b, or the "annual operating costs" will exceed \$1,000,000, G.S. § 131E-176(16)f (repealed 1993). In response to Catawba's letter, the Agency asked Catawba to furnish specific financial and operating projections so that the Agency could determine whether Catawba's proposal would require issuance of a CON.

On 15 March 1990, Catawba wrote a letter to the Agency containing its projected operating expenses for the first three years of operation. Catawba's projected operating expenses were below the \$1,000,000 threshold for each of the first three years. However, in evaluating Catawba's projections, the Agency found that the hospital had overlooked certain essential items of expense. Also, an Agency comparison of Catawba's financial projections to financial information from similar existing and proposed open heart surgery programs indicated that Catawba's operating expenses would exceed \$1,000,000 in each year of operation.

Based on its evaluation of Catawba's financial projections, and its comparison of those projections with the expenses of other facilities, the Agency advised Catawba on 25 April 1990 that the hospital would be required to obtain a CON before proceeding with an open heart surgery program.

On 24 May 1990, Catawba petitioned the Office of Administrative Hearings for a contested case hearing and thereafter moved for a decision recommending summary judgment. In support of its motion, Catawba filed its 15 March 1990 letter to the Agency which contained its projected operating expenses. In opposition to the motion, the Agency offered the affidavits of its Project Analyst

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and its CON Section Chief. These affidavits concluded that Catawba's operating expenses would exceed the \$1,000,000 threshold in each of the facility's first three years of operation.

The Administrative Law Judge, adopting Catawba's projected operating expenses, concluded that the surgical facility's operating expenses would not exceed the statutory threshold and would not require issuance of a CON. The Agency excepted to the recommended decision and filed its exceptions for review by the final agency decision maker.

On 12 April 1991, the case was called for hearing for a final agency decision before the Director of the Agency's Division of Facility Services, Mr. John Syria. During oral arguments, Catawba's counsel handed Mr. Syria a Request for Declaratory Ruling. The request sought, in pertinent part, a declaration that Catawba would not be required to obtain a CON if "the annual operating costs of the service [would] not exceed \$1,000,000 in the first year[.]"

On 16 April 1991, the Agency rendered a final agency decision which concluded that Catawba's annual operating expenses would exceed \$1,000,000 in each of the first three years of operation and that Catawba would be required to obtain a CON before commencing operation of the proposed open heart surgery facility. Catawba did not appeal this final agency decision.

On 3 May 1991, Mr. Syria responded by letter to Catawba's Request for Declaratory Ruling. Mr. Syria denied Catawba's request, explaining that Catawba's request was not filed until after the official record in the contested case had been closed. He further stated that although the facts set forth in a request for declaratory ruling are ordinarily taken as true, the facts in the instant case were established by the record in the contested case. Mr. Syria therefore declined to issue a declaratory ruling on the facts as set forth in the request.

On 5 June 1991, Catawba filed in the Wake County Superior Court a Petition for Judicial Review and Complaint for Declaratory Judgment. The petition only sought review of the denial of its Request for a Declaratory Ruling. Additionally, Catawba sought, pursuant to G.S. § 1-253, a declaratory judgment interpreting former G.S. § 131E-176(16)f. On 8 November 1991, AMI Frye Regional Medical Center was allowed to intervene.

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On 3 March 1992, the superior court issued an order reversing the final agency decision in the contested case. The court construed former G.S. § 131E-176(16)f as requiring only that the facility's operating expenses not exceed \$1,000,000 in the first year of operation. The court declared that the Agency exceeded its statutory authority by requiring that the facility's operating expenses not exceed \$1,000,000 in the first three years of operation.

On 4 March 1992, the superior court issued an amended order reversing the Agency's 3 May 1991 denial of Catawba's request for declaratory ruling, and dismissing Catawba's complaint for a declaratory judgment on the ground that the complaint was rendered moot by the court's ruling with respect to Catawba's Petition for Judicial Review under G.S. § 150B-43, *et seq.* The superior court concluded that it had adequately declared Catawba's rights regarding its proposed surgical services. All parties appeal.

Petree Stockton, by Noah H. Huffstetler, III, L. Elizabeth Henry, and Gary S. Qualls, for petitioner Catawba Memorial Hospital.

Attorney General Lacy H. Thornburg, by Associate Attorney General Margaret C. Ciardella, and Associate Attorney General Sherry L. Cornett, for respondent North Carolina Department of Human Resources.

Bode, Call & Green, by Robert V. Bode, S. Todd Hemphill and Diana E. Ricketts, for intervenor-respondent AMI Frye Regional Medical Center.

MARTIN, Judge.

The parties raise numerous issues by this appeal. We find three to be dispositive and, in view of our decisions with respect thereto, conclude that it is unnecessary to address the remainder. For the reasons set forth herein, the decision below is reversed in part and affirmed in part.

RESPONDENTS' APPEAL

[1] By their first assignment of error, respondents contend that the superior court erred by reversing the Agency's denial of Catawba's request for a declaratory ruling. Declaratory rulings under the Administrative Procedure Act are governed by G.S. § 150B-4, which provides in pertinent part:

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(a) On request of a person aggrieved, an agency shall issue a declaratory ruling as to the validity of a rule or as to the applicability to a given state of facts of a statute administered by the agency or of a rule or order of the agency, *except when the agency for good cause finds the issuance of a ruling undesirable*. (Emphasis added.)

Respondents argue that because the questions raised in Catawba's request to the Agency for a declaratory ruling were identical to the questions decided by the Agency in its final agency decision, the Agency had good cause to decline Catawba's request for a declaratory ruling. We agree.

The issue addressed by the decision maker in the contested case was "[w]hether the annual operating costs of Catawba's proposed open heart surgical service will equal or exceed one million dollars, thus making it a new institutional health service, requiring it to obtain a Certificate of Need." The Agency concluded that Catawba would be required to obtain a CON and that under former G.S. § 131E-176(16)f it was proper for the Agency to analyze the proposed service's annual operating costs for a three year period.

In its request for a declaratory ruling, Catawba sought, a declaration that it is entitled to offer open heart surgical services without obtaining a certificate of need so long as the capital expenditures associated with development of the service do not exceed \$2,000,000, [and] the annual operating costs of the service will not exceed \$1,000,000 in the first year In addition, Catawba requests a declaration that the three-year standard the Agency has applied to Catawba's proposal in determining the applicability of N.C.G.S. § 131E-176(16)f is an invalid rule.

Clearly, the issues to be addressed in deciding the contested case were virtually identical to the issues which Catawba sought to have determined by way of its requested declaratory ruling. Both actions required the Agency to determine the applicability of former G.S. § 131E-176(16)f to Catawba's proposed open heart surgery facility. As stated by Director Syria in his letter denying Catawba's request for a declaratory ruling, the interpretation sought by Catawba was included in the decision in the contested case. Furthermore, Catawba did not approach the Agency for a declaratory ruling until after the official record in the contested case had

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been closed. Whereas a declaratory ruling by definition involves the application of a statute or agency rule to a given state of facts, the facts regarding Catawba's proposed surgical services were established by the record in the contested case.

We hold good cause exists for denial of a request for a declaratory ruling where the denial is based on the existence of a prior agency ruling which necessarily required an interpretation of the same statute which is the subject of the request for declaratory ruling. To hold otherwise would be to require an agency to twice decide the same case, between the same parties, by applying the same statute to the same facts. We are convinced that the Administrative Procedure Act was not intended to allow such unnecessary repetition. Thus, the Agency's denial of Catawba's request was for good cause, and we must reverse that part of the superior court's order which reversed the Agency's denial of Catawba's request for declaratory ruling.

[2] Respondents also assign error to that portion of the superior court's order which reversed the 16 April 1991 final agency decision. Respondents argue that the superior court lacked jurisdiction to enter an order reversing the final agency decision. We agree.

The record shows, and the parties agree, that Catawba did not perfect an appeal of the final agency decision. Rather, Catawba's appeal to the superior court only sought review of the Agency's refusal to issue a declaratory ruling in response to Catawba's request. Moreover, G.S. § 131E-188, which governs appeals from final agency decisions regarding the issuance of a CON, provides that such appeals are to be filed in this Court, not the superior court. N.C. Gen. Stat. § 131E-188; *Iredell Mem. Hosp. v. N.C. Dept. of Human Resources*, 103 N.C. App. 637, 406 S.E.2d 304 (1991). Thus, the superior court had no jurisdiction to consider the final agency decision and that decision, not having been appealed, remains binding on the parties.

PETITIONER'S APPEAL

[3] Catawba assigns error to the portion of the superior court's order which dismissed Catawba's complaint for declaratory judgment on the ground that it was moot. The superior court ruled that Catawba's complaint was moot on the ground that it had adequately determined Catawba's rights under former G.S. § 131E-176(16)f when it reversed the final agency decision. Catawba

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argues that its complaint for a declaratory judgment will no longer be moot if we reverse the superior court's decision in favor of Catawba. Because we have reversed the superior court's decision in favor of Catawba, we must now determine whether dismissal of Catawba's complaint for declaratory judgment was proper. We hold that Catawba's complaint was properly dismissed, although on grounds other than mootness.

As we have previously noted, Catawba failed to appeal the final agency decision in the contested case. "[A] final judgment, rendered on the merits, by a court of competent jurisdiction, is conclusive of rights, questions and facts in issue, as to the parties and privies, in all other actions involving the same matter." *Masters v. Dunstan*, 256 N.C. 520, 523, 124 S.E.2d 574, 576 (1962), (*quoting Bryant v. Shields*, 220 N.C. 628, 634, 18 S.E.2d 157, 161 (1942)). Such a final judgment will bar a subsequent action involving the same issues between the same parties. *Thomas M. McInnis & Assoc., Inc. v. Hall*, 318 N.C. 421, 349 S.E.2d 552 (1986); *see also, Cannon v. Cannon*, 223 N.C. 664, 28 S.E.2d 240 (1943).

Without question, Catawba's declaratory judgment action and the contested case involved the same parties: Catawba and the Agency. Likewise, we are persuaded that the issues addressed in the final agency decision are identical to the issues raised in Catawba's declaratory judgment action.

The central issue in both cases was whether, under former G.S. § 131E-176(16)f, Catawba would be required to obtain a CON prior to offering its proposed open heart surgical services. A CON would be required if Catawba's "annual operating costs" exceeded \$1,000,000. N.C. Gen. Stat. § 131E-176(16)f (repealed 1993). However, the phrase "annual operating costs" is not defined by the statute. Thus, in rendering a decision in the contested case, the decision maker was required to interpret the meaning of the phrase "annual operating costs." The decision maker concluded that "the term 'annual operating costs' in the statute is not limited to annual operating costs in the first year."

In its complaint for declaratory judgment, Catawba prayed for a declaration that "[a]s a matter of law, the \$1,000,000 limitation on operating costs set forth in N.C.G.S. § 131E-176(16)f applies to the operating costs for the first year the service is offered" Thus, Catawba was seeking a declaratory judgment regarding a matter which it previously litigated in the contested case and

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which was resolved against it in the final agency decision. As we have said, the final agency decision was never appealed and remains binding on the parties.

Although the contested case decision was an administrative decision, it may nevertheless bar Catawba's request for a declaratory judgment under the doctrine of *res judicata*. As a general rule, "[a]n administrative decision denying or dismissing a party's claim on the merits precludes such party from obtaining, in a judicial proceeding not designed for review of the administrative decision, the relief denied by the administrative agency, whether upon the same ground as urged in the administrative proceeding, or upon another ground." 2 Am. Jur. 2d *Administrative Law* § 502. In *In Re Mitchell*, 88 N.C. App. 602, 364 S.E.2d 177 (1988), this Court stated:

Whether an administrative decision is *res judicata* depends upon its nature; decisions that are "judicial" or "quasi-judicial" can have that effect, decisions that are simply "administrative" or "legislative" do not. Though the distinction between a "quasi-judicial" determination and a purely "administrative" decision is not precisely defined, the courts have consistently found decisions to be quasi-judicial when the administrative body adequately notifies and hears before sanctioning, and when it adequately provides in the legislative authority for the proceeding's finality and review.

Id. at 605, 364 S.E.2d at 179. Thus, we examine the legislative authority which governs contested cases involving certificates of need to decide whether the final agency decision was a "judicial" decision.

G.S. § 131E-188(a) provides:

After a decision of the Department to issue, deny or withdraw a certificate of need or exemption or to issue a certificate of need pursuant to a settlement agreement with an applicant to the extent permitted by law, any affected person, . . . shall be entitled to a contested case hearing

G.S. § 131E-188(b) provides that "[a]ny affected person who was a party to a contested case hearing shall be entitled to judicial review of all or any portion of any final decision of the department"

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Clearly, the foregoing sections adequately provide for the finality and review of the final agency decision in the present case. Thus, we conclude that the final agency decision was a judicial decision which barred, as *res judicata*, Catawba's complaint for declaratory judgment. Based on the foregoing conclusion, we hold that the superior court's dismissal of Catawba's declaratory judgment complaint was proper. A judgment which is correct must be affirmed even though the reason stated for its entry is incorrect. *Payne v. Buffalo Reinsurance Co.*, 69 N.C. App. 551, 317 S.E.2d 400 (1984).

In summary, we reverse that part of the order of the superior court which reversed the final agency decision of the respondent Agency requiring the petitioner to obtain a certificate of need before providing the proposed open heart surgical services, as well as the decision of the respondent Agency denying Catawba's request for a declaratory ruling. The order of the superior court dismissing Catawba's complaint for declaratory judgment is affirmed.

Reversed in part, and affirmed in part.

Chief Judge ARNOLD and Judge COZORT concur.

EMPIRE POWER COMPANY, AND GEORGE CLARK, PETITIONERS v. N.C. DEPARTMENT OF ENVIRONMENT, HEALTH AND NATURAL RESOURCES, DIVISION OF ENVIRONMENTAL MANAGEMENT, RESPONDENT, AND DUKE POWER COMPANY, INTERVENOR-RESPONDENT

No. 9210SC1150

(Filed 16 November 1993)

- 1. Administrative Law and Procedure § 30 (NCI4th); Environmental Protection, Regulation, and Conservation § 63 (NCI4th) — issuance of air quality permit — contested case hearing — no right of third party to seek**

Third parties may not seek a contested case hearing under N.C.G.S. § 143-215.108(e) to challenge DEHNR issuance of an air quality permit.

Am Jur 2d, Administrative Law §§ 340-375; Pollution Control §§ 64, 69, 70.

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2. Administrative Law and Procedure § 55 (NCI4th); Environmental Protection, Regulation, and Conservation § 63 (NCI4th)—issuance of air quality permit—right of landowner and power company to judicial review

A power company and a landowner were entitled to judicial review of DEHNR's decision to grant an air quality permit without requiring an environmental impact statement, since (1) the power company was an aggrieved person because its interest in having DEHNR prepare an EIS before issuing a permit and its interest in the air resources of the State were adversely affected by DEHNR's granting of the permit; (2) the landowner qualified as an aggrieved person because he owned and lived on property adjacent to the permit site; (3) because Duke Power did not file a petition challenging the decision of DEHNR within 30 days after DEHNR notified Duke of the permitting decision, the permitting decision was final; (4) the decision making process was a contested case since there was an agency proceeding in which written comments were submitted, a public hearing was held, and DEHNR's hearing officer allegedly reviewed these comments and then determined the rights of everyone involved by deciding that an EIS was not required before issuing a permit; (5) the power company and the landowner had exhausted their only available administrative remedy, which was participating in the agency's decision making process by filing comments during the 30-day public comment period held by the State, requesting a public hearing when a draft permit was issued, and speaking at the public hearing; (6) there was no other statute providing adequate procedure for judicial review; and (7) the language of N.C.G.S. § 143-215.108(e) does not prohibit judicial review of a final agency decision in a contested case by an aggrieved third party where the permit or permit applicant has not challenged the agency decision.

Am Jur 2d, Administrative Law §§ 575, 576; Pollution Control §§ 64, 69, 70.

Appeal by respondent and intervenor-respondent from order entered 22 September 1992 in Wake County Superior Court by Judge Henry V. Barnette, Jr. Heard in the Court of Appeals 6 October 1993.

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[112 N.C. App. 566 (1993)]

Broughton, Wilkins, Webb & Jernigan, P.A., by William Woodward Webb, for petitioner-appellee Empire Power Company.

Patterson, Harkavy & Lawrence, by Donnell Van Noppen, III, for petitioner-appellee George Clark.

Attorney General Lacy H. Thornburg, by Associate Attorney General James Holloway, for respondent-appellant State.

Duke Power Company Legal Department, by Associate General Counsel William L. Porter and Senior Attorney, Garry S. Rice, Womble Carlyle Sandridge & Rice, by Yvonne C. Bailey and Karen Estelle Carey, for intervenor-appellant Duke Power Company.

GREENE, Judge.

The North Carolina Department of Environment, Health and Natural Resources, Division of Environmental Management (DEHNR) and Duke Power Company (Duke) appeal from dismissal of their petition for writ of certiorari to review the Order by an Administrative Law Judge (ALJ) denying their motions to dismiss for lack of subject matter jurisdiction over a third party's petition for contested case hearing. Although we are compelled to dismiss this appeal because the record does not contain a certificate of service of the notice of appeal as required by Rule 26 of the North Carolina Rules of Appellate Procedure, *Hale v. Afro-American Arts International*, 110 N.C. App. 621, 430 S.E.2d 457 (1993), we choose to treat this appeal as a petition for writ of certiorari and grant the writ pursuant to N.C. Gen. Stat. § 7A-32(c) (1989).

On 4 September 1991, DEHNR issued public notice that it had awarded a draft air quality permit to Duke for the construction and operation of sixteen combustion turbine electric generating units at the Lincoln Combustion Turbine Station (LCTS) in Lincoln County, North Carolina. All public comments on the draft LCTS permit had to be filed with DEHNR by 10 October 1991. On 1 October 1991, Empire Power Company (Empire) filed written comments opposing the finalization of the draft permit. George Clark (Clark), who owns and lives on property in Lincoln County immediately adjacent to the proposed LCTS, participated in the agency's administrative process due to the impact the LCTS will have on his home and family by submitting written comments and speak-

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ing at a public hearing. Mr. Arthur Mouberry (Mouberry), DEHNR's assigned hearing officer, allegedly reviewed the comments received and recommended finalization of the draft LCTS permit with minor revisions. Mouberry also determined that an Environmental Impact Statement (EIS) was not required under N.C. Gen. Stat. §§ 113A-1 to -10 (1989) prior to the issuance of the final permit. On 20 December 1991, DEHNR finalized the draft permit and issued Permit No. 7171 (Permit) to Duke for the LCTS. On 10 January 1992, Empire filed a Petition for Contested Case Hearing with the North Carolina Office of Administrative Hearings (OAH) seeking review of DEHNR's decision to (1) issue the Permit under State and Federal Prevention of Significant Deterioration (PSD) regulations, and (2) issue the Permit without requiring preparation of an EIS. On 21 January 1992, Clark also filed a Petition for Contested Case Hearing with the OAH, alleging the Permit violates governing laws and regulations.

In February, 1992, DEHNR filed motions to dismiss in both cases for lack of subject matter jurisdiction. Duke was allowed to intervene in both the Empire case and the Clark case which were consolidated by Order of the ALJ on 28 February 1992. On 17 July 1992, Duke filed motions to dismiss for lack of subject matter jurisdiction in both cases. By Order dated 13 August 1992, the ALJ denied all four motions to dismiss filed by DEHNR and Duke.

On 18 August 1992, DEHNR and Duke filed a Petition for Writ of Certiorari in Wake County Superior Court which was granted *ex parte*. On 8 September 1992, Clark filed a motion to dismiss the Petition for Writ of Certiorari on the grounds that the petition was granted without legal basis and should be dismissed. On 22 September 1992, the trial court issued an order (1) allowing Clark's motion to dismiss the judicial proceeding; and (2) remanding the case to the OAH for further proceedings.

The issues presented are whether (I) third parties are entitled to a contested case hearing in OAH to challenge DEHNR's issuance of an air quality permit; and (II) third parties are entitled to judicial review to challenge DEHNR's issuance of an air quality permit.

I

[1] The air quality permitting statute under Article 21B which governs air pollution control states:

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A permit applicant or permittee who is dissatisfied with a decision of the [Environmental Management] Commission may commence a contested case by filing a petition under G.S. 150B-23 within 30 days after the Commission notifies the applicant or permittee of its decision. If the permit applicant or permittee does not file a petition within the required time, the Commission's decision on the application is final and is not subject to review.

N.C.G.S. § 143-215.108(e) (Supp. 1992). This language is identical to the provision governing administrative review of National Pollutant Discharge Elimination System permitting for water pollution control, N.C.G.S. § 143-215.1(e) (Supp. 1992), interpreted by this Court in *Citizens for Clean Industry, Inc. v. Lofton*, 109 N.C. App. 229, 427 S.E.2d 120 (1993). In *Citizens*, this Court concluded that since N.C. Gen. Stat. § 143-215.1(e) created a cause of action providing that only the permit applicant or permittee may commence a contested case hearing, *Yates v. North Carolina Dep't of Human Resources*, 98 N.C. App. 402, 404, 390 S.E.2d 761, 762 (1990), third parties had no right to a contested case hearing under Article 3 of Chapter 150B. *Citizens*, 109 N.C. App. at 234, 427 S.E.2d at 123. Because the language in Section 143-215.108(e) is identical to the language in Section 143-215.1(e) and because of the construction placed by this Court in *Citizens* on the language of Section 143-215.1(e), we now hold that third parties may not seek a contested case hearing under Section 143-215.108(e) to challenge DEHNR's issuance of an air quality permit.

In so holding, we reject the argument of Empire and Clark that a 1991 amendment to Chapter 150B requires a different result. The 1991 Amendment provides that "[t]his Chapter confers procedural rights" and that "[t]he contested case provisions of this Chapter apply to all agencies and all proceedings not expressly exempted." N.C.G.S. § 150B-1(b), (e) (1991). Empire and Clark argue that this language entitles third parties to contested case hearings. Although the 1991 Amendment was not effective when the *Citizens* Court construed N.C. Gen. Stat. § 143-215.1(e), a different result is not required. The 1991 Amendment merely confirms that when a person is aggrieved by agency action, the APA only "describe[s] the procedures" for OAH review in the event the North Carolina General Assembly vests a party with the right to administrative review, such as a contested case hearing. *Batten v. North Carolina Dep't of Correction*, 326 N.C. 338, 342-43, 389 S.E.2d 35, 38 (1990);

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North Carolina Elec. Membership Corp. v. North Carolina Dep't of Economic & Community Dev., 108 N.C. App. 711, 720, 425 S.E.2d 440, 446 (1993) (where statutory language is ambiguous, amendment may be deemed as a clarification of language expressing the law).

II

[2] We now address whether Empire and Clark are nonetheless entitled to judicial review of DEHNR's decision to grant an air quality permit to Duke. Section 143-215.5 of Article 21 states that "Article 4 of Chapter 150B of the General Statutes governs judicial review of a final decision of the Secretary or of an order of the Commission under this Article **and Articles 21A and 21B of this Chapter.**" N.C.G.S. § 143-215.5 (Supp. 1992) (emphasis added). Article 4, N.C. Gen. Stat. § 150B-43 imposes five requirements in order to obtain judicial review: (1) the petitioner must be an aggrieved party; (2) there must be a final decision; (3) the decision must result from a contested case; (4) the petitioner must have exhausted all administrative remedies; and (5) there must be no other adequate procedure for judicial review. N.C.G.S. § 150B-43 (1991); *Charlotte Truck Driver Training School v. N.C. DMV*, 95 N.C. App. 209, 211-12, 381 S.E.2d 861, 862 (1989).

Section 150B-2(6) defines an aggrieved person as "any person or group of persons of common interest directly or indirectly affected substantially in his or its person, property, or employment by an administrative decision," N.C.G.S. § 150B-2(6) (1991); therefore, legal or personal rights or interests must be adversely affected before a person is aggrieved. *Carter v. N.C. State Bd. for Professional Engineers*, 86 N.C. App. 308, 313, 357 S.E.2d 705, 708 (1987); N.C.G.S. § 150B-2(7) (1991) (person includes natural person, partnership, corporation, body politic, unincorporated association, organization, or society which may sue or be sued under common name). Empire satisfies the definition of an aggrieved person because its interest in having DEHNR prepare an EIS before issuing a permit and its interest in the air resources of the State are adversely affected by DEHNR's granting of the Permit. Clark also qualifies as an aggrieved person as he owns and lives on property adjacent to the proposed LCTS site. See *Orange County v. North Carolina Dept. of Transportation*, 46 N.C. App. 350, 361, 265 S.E.2d 890, 899 (procedural injury implicit in agency failure to prepare EIS

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sufficient if petitioner expected to suffer due to geographical nexus), *disc. rev. denied*, 301 N.C. 94, --- S.E.2d --- (1980).

In addition to the requirement that the petitioner be an aggrieved party, there must be a final agency decision before the petitioner is entitled to judicial review. Section 143-215.108(e) provides that unless the decision of DEHNR is contested by the permittee or permit applicant, it becomes "final and is not subject to review." N.C.G.S. § 143-215.108(e). Because Duke did not file a petition challenging the decision of DEHNR within 30 days after DEHNR notified Duke of the permitting decision, we hold that the permitting decision is final. *See Citizens*, 109 N.C. App. at 234, 427 S.E.2d at 123.

To obtain judicial review, the final decision must concern a contested case, defined as "an administrative proceeding pursuant to this Chapter to resolve a dispute between an agency and another person that involves the person's rights, duties, or privileges, including licensing" N.C.G.S. § 150B-2(2) (1991). In this case, although there was no hearing before an ALJ, there was an agency proceeding in which written comments were submitted, a public hearing was held, and Mouberry, DEHNR's hearing officer, allegedly reviewed these comments and then determined the rights of everyone involved by deciding that an EIS was not required before issuing a permit and that the draft LCTS permit should be finalized. This decision making process is a contested case since it involved an agency proceeding determining the rights of a party. *See Charlotte Truck Driver Training School*, 95 N.C. App. at 212, 381 S.E.2d at 862-63 (in person interview and investigation conducted by agency hearing officer is contested case); *Charlotte-Mecklenburg Hosp. Authority v. N.C. Dept. of Human Resources*, 83 N.C. App. 122, 124, 349 S.E.2d 291, 292 (1986) (term "contested case" does not refer only to actions in which an adjudicatory hearing has been held, but rather to any agency proceeding which determines rights of a party and is therefore broader than "contested case hearing").

Furthermore, although we have determined Empire and Clark, as third parties, have no right to a contested case hearing, they have nevertheless exhausted their only available administrative remedy, i.e., participating in the agency's decision making process by filing comments during the 30-day public comment period held by the State, requesting a public hearing when a draft permit

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was issued, and speaking at the public hearing. Empire and Clark can also meet the fifth requirement of Section 150B-43 because there is no other statute providing adequate procedure for judicial review.

Although Empire and Clark meet the requirements for obtaining judicial review pursuant to Section 150B-43, a question remains as to whether the language in Section 143-215.108(e), which provides that unless the decision of DEHNR is contested by the permittee or permit applicant, it is "not subject to review," precludes third parties from seeking judicial review when the permittee or permit applicant has not contested the agency decision. The language "not subject to review" necessarily means the permit applicant or permittee may seek neither a contested case hearing before an ALJ under Section 143-215.108(e) nor judicial review under Section 150B-43 if the permittee or permit applicant has not filed a petition within 30 days of notification of the agency's decision. *See* N.C.G.S. § 143-215.108(e). We do not read this language to prohibit judicial review of a final agency decision in a contested case by an aggrieved third party where the permit or permit applicant has not challenged the agency decision. In summary, because Empire and Clark are parties aggrieved by a final agency decision in a contested case and because they have exhausted all available administrative remedies and there is no other statute providing for judicial review, they are entitled to judicial review under N.C. Gen. Stat. § 150B-43.

For these reasons, the trial court erred in granting Clark's motion to dismiss respondents' petition for writ of certiorari. We reverse and remand to the superior court for entry of an order reversing the ALJ's decision denying Duke and DEHNR's motions to dismiss for lack of subject matter jurisdiction. We note that although petitioners have waived their right to judicial review by failing to file a petition within the required time, petitioners may file a petition with the superior court pursuant to N.C. Gen. Stat. § 150B-45. Though its filing would be untimely, the superior court clearly has discretionary authority to allow late filing for good cause shown. *Id.*

Reversed and remanded.

Judges EAGLES and ORR concur.

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[112 N.C. App. 574 (1993)]

MICHAEL T. HAAS AND WYNN MARTIN HAAS v. JAMES S. WARREN, AND
WARREN AND PERRY, ATTORNEYS AT LAW

No. 9210SC992

(Filed 16 November 1993)

**Attorneys at Law § 45 (NCI4th)— malpractice—standard of care
in community—insufficiency of evidence**

Testimony by defendant attorney and his associate in a legal malpractice action that they did not publish a legal notice in the same newspaper used by other attorneys in their community was insufficient evidence of the standard of care for attorneys in that community, and the trial court therefore properly entered a directed verdict for defendants.

Am Jur 2d, Attorneys at Law § 223.

Admissibility and necessity of expert evidence as to standards of practice and negligence in malpractice action against attorney. 14 ALR4th 170.

On writ of certiorari from order entered 30 September 1991 by Judge Knox V. Jenkins in Wake County Superior Court. Heard in the Court of Appeals 15 September 1993.

Everett Gaskins Hancock & Stevens, by E.D. Gaskins, Jr., Hugh Stevens, and Katherine R. White, for plaintiffs-appellants.

Bailey and Dixon, by Patricia P. Kerner, for defendants-appellees.

WYNN, Judge.

The question presented in this case is whether testimony by the defendant attorney and his associate in a legal malpractice action that they did not publish a legal notice in the same newspaper used by other attorneys in their community is sufficient evidence of the standard of care for attorneys in that community. The trial court entered a directed verdict for defendants. We affirm.

On 2 September 1986, plaintiffs sold a tract of land located in Franklin County to Ronnie and Daria LaShannon. The LaShannons signed a promissory note and executed a deed of trust granting the property to their attorney, defendant James S. Warren, as trustee for plaintiffs. In 1988, plaintiffs asked defendant to begin

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foreclosure proceedings against the LaShannons for failure to pay the note. John Cook, an associate in defendant's law firm, placed the required legal advertisement for the foreclosure sale in *The Wake Weekly*. Cook said that previously, the firm had always published legal notices concerning Franklin County matters in *The Franklin Times*.

Cook testified that when he placed the advertisement he and defendant were unaware of any other attorneys who had published foreclosure notices which concerned property in Franklin County in *The Wake Weekly*. They chose *The Wake Weekly* in order to avoid the high advertising costs of *The Franklin Times*. Cook said he performed some research on whether the advertisement would be proper if published in *The Wake Weekly*. He admitted that he did not find and was not aware of N.C. Gen. Stat. § 1-597 which states that a legal notice which is required to be advertised in a newspaper shall have no effect unless it is published in a newspaper which has "been admitted to the United States mails as second class matter in the county or political subdivision where such . . . notice is required to be published." N.C. Gen. Stat. § 1-597 (1983). The trial court took judicial notice of the fact *The Wake Weekly* did not comply with N.C. Gen. Stat. § 1-597.

The foreclosure sale was held on 19 September 1988 and plaintiffs purchased the property for \$66,733.11. After the sale, the LaShannons filed a lawsuit against plaintiffs and defendant contending that publishing the notice of the sale in *The Wake Weekly* was improper. Plaintiffs and defendant signed a consent order to set aside the foreclosure sale. On 28 April 1989, after publishing the legal notice in *The Franklin Times*, a second foreclosure sale was held and plaintiffs purchased the property for \$70,844.96. Defendant then requested \$3,814.99 of this amount as his trustee's commission.

Plaintiffs brought this action against defendant and his law firm for legal malpractice. At the close of plaintiffs' evidence, the trial court granted defendants' motion for a directed verdict. From this order, plaintiffs appeal.

Plaintiffs contend the trial court erred in granting defendants' motion for a directed verdict. They argue that they established the applicable standard of care in the legal community through their examination of Cook and Warren. Plaintiffs contend that the

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testimony of Cook and Warren that they were unaware of any other lawyer in their community who advertised in *The Wake Weekly* was sufficient to survive defendants' motion for a directed verdict. We disagree.

In reviewing the granting of a directed verdict for the defendant in a negligence action, this Court must consider the evidence in the light most favorable to the plaintiff and can only affirm the verdict if, as a matter of law, a recovery cannot be had by the plaintiff upon any view of the facts which the evidence reasonably tends to establish. *Shreve v. Duke Power Co.*, 97 N.C. App. 648, 389 S.E.2d 444, *disc. rev. denied*, 326 N.C. 598, 393 S.E.2d 883 (1990). All of the evidence which supports the plaintiff's claim must be taken as true and "considered in the light most favorable to him, giving him the benefit of every reasonable inference which may legitimately be drawn therefrom, and with contradictions, conflicts and inconsistencies being resolved in his favor." *City of Charlotte v. Skidmore, Owings and Merrill*, 103 N.C. App. 667, 678, 407 S.E.2d 571, 578 (1991); *Smith v. VonCannon*, 283 N.C. 656, 197 S.E.2d 524 (1973); *May v. Mitchell*, 9 N.C. App. 298, 176 S.E.2d 3 (1970).

In order to show negligence in a legal malpractice action, the plaintiff must first prove by the greater weight of the evidence that the attorney breached the duties owed to his client as established by *Hodges v. Carter*, 239 N.C. 517, 80 S.E.2d 144 (1954) and then show that this negligence proximately caused damage to the plaintiff. *Summer v. Allran*, 100 N.C. App. 182, 394 S.E.2d 689 (1990), *disc. rev. denied*, 328 N.C. 97, 402 S.E.2d 428 (1991). The duties promulgated by *Hodges* are:

Ordinarily when an attorney engages in the practice of the law and contracts to prosecute an action in behalf of his client, he impliedly represents that (1) he possesses the requisite degree of learning, skill, and ability necessary to the practice of his profession and which others similarly situated ordinarily possess; (2) he will exert his best judgment in the prosecution of the litigation entrusted to him; and (3) he will exercise reasonable and ordinary care and diligence in the use of his skill and in the application of his knowledge to his client's cause.

Hodges, 239 N.C. at 519, 80 S.E.2d at 145-146.

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[112 N.C. App. 574 (1993)]

In *Rorrer v. Cooke*, our Supreme Court expounded on the standard of care concept.

The third prong of *Hodges* requires an attorney to represent his client with such skill, prudence, and diligence as lawyers of ordinary skill and capacity commonly possess and exercise in the performance of the tasks which they undertake. The standard is that of members of the profession in the same or similar locality under similar circumstances.

Rorrer v. Cooke, 313 N.C. 338, 356, 329 S.E.2d 355, 366 (1985).

In *Progressive Sales, Inc. v. Williams, Willeford, Boger, Grady & Davis*, 86 N.C. App. 51, 356 S.E.2d 372 (1987), the plaintiffs charged their attorney with negligence for improperly filing Uniform Commercial Code financing statements as required by statute. At trial, the plaintiffs did not offer any testimony of other attorneys practicing commercial law in the defendant's legal community. In affirming a motion for involuntary dismissal against the plaintiffs, this Court stated:

The evidence at trial is clear as to what [the attorney] did and did not do. What is not clear is the standard by which [the attorney's] acts and omissions are to be weighed. That is the purpose of putting on evidence as to the standard of care in a malpractice lawsuit; to see if this defendant's actions "lived up" to that standard.

Id. at 56, 356 S.E.2d at 375-376 (1987).

In the instant case, plaintiffs argue the standard of care was established by Cook and Warren's testimony. At trial, Cook testified:

Q So it's correct to say that you had, you had never published a notice of foreclosure sale on a Franklin County foreclosure in the Wake Weekly until you undertook to do it on Mr. Haas' foreclosure, is that correct?

A Yes, with the proviso that it was at the first of the foreclosures, first actually of three. That's where I got confused.

Q No other attorney in the firm had had a foreclosure in Franklin County published in the Wake Weekly prior to that time, had they, prior to the first?

A Prior to, prior to the first appearance, that's correct.

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Warren then testified to the following:

Q Now you talked to some attorneys in the area also, didn't you?

A I did.

Q And you inquired of them, among other things, what their practice was with respect to the publication of notice for Franklin County foreclosure, didn't you?

A I discussed it with other attorneys over a period of time. This is something I wanted to do for quite a few years. Again, other than Charles Davis, I can't even recall who I might have discussed it with. I certainly wasn't discussing it just for Franklin County.

Q Now at the point in time these discussions occurred, your firm had never placed such an ad in the Wake Weekly, is that right?

A That would be correct.

Q You inquired of these other attorneys about their practice in that respect, didn't you?

A Yes.

Q And they told you that their practice was to, to publish ads for Franklin County foreclosures in the Franklin Times, didn't they?

A Yes.

Q And were you aware of anyone who made a practice of publishing notices of sale for Franklin County foreclosures in the Wake Weekly while not also publishing it in the Franklin Times?

A No.

Q So you were aware when you did this, that this is something that was not done, not generally done in the legal community where you practiced, weren't you?

A That's correct.

This testimony, taken in the light most favorable to the plaintiffs, fails to establish the applicable standard of care in defendant's

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legal community. The testimony is evidence of what other attorneys *do*, not evidence of what they *should do* which is what is required by *Hodges* and *Rorrer*. "The law is not an exact science but is, rather, a profession which involves the exercise of individual judgment. Differences in opinion are consistent with the exercise of due care." *Rorrer*, 313 N.C. at 357, 329 S.E.2d at 367. Plaintiffs' evidence does not show the standard by which defendants' actions are to be weighed. The testimony of Cook and Warren does not establish the "skill, prudence, and diligence as lawyers of ordinary skill and capacity commonly possess and exercise in the performance of the tasks which they undertake." *Id.* at 356, 329 S.E.2d at 366.

Under the third prong of *Hodges*, to establish a breach of duty by the attorney the plaintiff must produce evidence that the defendant failed "to exercise ordinary care in the use of his skill or the application of his knowledge to the plaintiff's case." Charles E. Daye and Mark W. Morris, *North Carolina Law of Torts*, § 18.32 (1991). See *Hodges*, 239 N.C. at 519, 80 S.E.2d at 145-146; *Rorrer*, 313 N.C. at 356, 329 S.E.2d at 366. In *Rorrer*, the plaintiff submitted the affidavit of an attorney which outlined several things he would have done which the defendant attorney did not do. The Court held the affidavit was insufficient proof that the defendant violated his duty of care because "the affidavit nowhere states that [the defendant's] inaction violated a standard of care required of similarly situated attorneys." *Rorrer*, 313 N.C. at 356-357, 329 S.E.2d at 367.

Similarly, in the case *sub judice*, the plaintiffs did not present any testimony that defendants' actions violated the standard of care in their legal community. Cook and Warren's testimony that all other attorneys in their community use *The Franklin Times* is not the same as what is required by *Hodges* and *Rorrer*—that the standard of care in their community *requires them* to use *The Franklin Times*.

Plaintiffs also argue that defendants' failure to find and follow N.C. Gen. Stat. § 1-597 which sets forth the criteria for publishing legal notices in newspapers is negligence as a matter of law. We disagree.

No lawyer is bound to know all the law. It is not an exact science. There is no attainable degree of skill or excellence at which all differences of opinion or doubts upon questions of law can be removed from the minds of lawyers and judges. If the law on the subject is well and clearly defined and has

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existed and been published long enough to justify the belief that it was known to the profession, a lawyer who disregards the rule or is ignorant of it renders him liable for losses caused by such negligence or want of skill.

George v. Caton, 93 N.M. 370, 377, 600 P.2d 822, 829 (1979). *Accord Hodges*, 239 N.C. at 520, 80 S.E.2d at 146; *Berman v. Rubin*, 138 Ga. App. 849, 227 S.E.2d 802 (1976). *See also National Sav. Bank of District of Columbia v. Ward*, 100 U.S. 195, 199, 25 L. Ed. 621, 623 (1879) ("[A]ttorneys do not profess to know all the law or to be incapable of error or mistake in applying it to the facts of every case, as even the most skillful of the profession would hardly be able to come up to that standard.") Plaintiffs failed to provide any evidence that a competent attorney would have found or be aware of N.C. Gen. Stat. § 1-597. The jury needs some evidence of what a competent attorney would have done under similar circumstances in order to determine whether the defendant's actions met that standard. *Progressive Sales*, 86 N.C. App. at 56, 356 S.E.2d at 376.

Since plaintiffs did not provide evidence by which defendants' actions are to be measured, the granting of a directed verdict by Judge Jenkins against plaintiffs was proper. Accordingly, the action of the trial court is

Affirmed.

Chief Judge ARNOLD and Judge JOHN concur.

DEPARTMENT OF TRANSPORTATION, PLAINTIFF v. RALPH W. FLEMING,
AND SEVERA FLEMING, DEFENDANTS

No. 9230SC1086

(Filed 16 November 1993)

**Eminent Domain § 122 (NC14th)— business conducted on property
to be condemned—loss of profits not element of recoverable
damages**

In a condemnation action, the trial court erred in allowing defense witnesses to give opinions regarding the value of de-

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defendants' land which were based entirely on the net income from the operation of defendants' plumbing business, since loss of profits from the operation of a business conducted on the property is not an element of recoverable damages in an award pursuant to an eminent domain taking.

Am Jur 2d, Eminent Domain § 287.

On plaintiff's writ of certiorari from judgment entered 20 August 1992 by Judge Forrest A. Ferrell in Haywood County Superior Court. Heard in the Court of Appeals 1 October 1993.

On 14 January 1991, plaintiff Department of Transportation filed this condemnation action against defendant landowners pursuant to G.S. 136-103 to appropriate for highway purposes a one-fourth acre, triangular shaped tract of land adjacent to U.S. Highway 276 in Haywood County. A concrete building containing approximately 1900 square feet is located on the tract and approximately 4000 square feet of area adjacent to the building is paved. There is also a small utility building behind the main building. Defendants own the property and operate a plumbing and heating business on the property.

Plaintiff estimated that \$58,700 was just compensation for the taking of defendants' land and deposited that amount with the court. Defendants demanded a jury trial. The parties stipulated that the only issue before the jury was the amount of compensation to be paid for the taking. The case was tried on 17 August 1992.

At trial defendants presented the testimony of two expert witnesses, Mr. Carroll Mease and Mr. Bobby Joe McClure. Mease was accepted by the trial court as an expert in the area of real estate appraisals. Mease testified that the value of defendants' land immediately before the taking was \$231,162. He arrived at that figure by taking the 1990 net income from the operation of defendants' plumbing business and applying a capitalization rate. The small area remaining after the taking was valued at \$2000, giving defendants damages of \$229,162. Defense witness McClure was accepted as an "expert in real estate values" after the court refused to accept him as an expert appraiser. McClure testified that defendants' property had a value of \$245,116 immediately before the taking. He arrived at this figure by capitalizing the 1991 net income from defendants' business. McClure valued the remaining property at \$1000, giving defendants damages of \$244,116.

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Plaintiff presented the testimony of Mr. Marty Reece, who was employed by the Department of Transportation as a real estate appraiser. Reece testified that the value of defendants' land immediately before the taking was \$62,425 and he assigned no value to the small remaining piece of land. Reece arrived at this figure by using the cost approach, which values the land as if it were unimproved and then adds the depreciated value of all improvements located on the land. Plaintiff also presented the testimony of Mr. Brent Anderson, who was accepted as an expert witness in the field of real estate appraisal. Anderson was hired by the Department of Transportation to appraise defendants' property. Anderson testified that he valued defendants' property at \$56,275. He arrived at this figure by using the same cost approach used by plaintiff's witness Reece.

The jury awarded defendants \$127,500 as just compensation for the taking of their property. Since plaintiff had already deposited \$58,700 with the court, the court ordered plaintiff to deposit an additional \$77,606.40 with the court to cover the balance of the jury verdict. Plaintiff appeals.

Attorney General Michael F. Easley, by Assistant Attorney General Charlie C. Walker, for plaintiff-appellant.

Holt, Bonfoey, Brown & Queen, P.A., by Richlyn D. Holt and H.S. Ward, Jr., for defendant-appellees.

EAGLES, Judge.

Plaintiff's only assignment of error is that the trial court erred in allowing defense witnesses Mease and McClure to give an opinion regarding the value of defendants' land because their opinions were based entirely on the net income from the operation of defendants' plumbing business. We agree and reverse the judgment of the trial court and remand for a new trial.

The general rule, subject to some limited exceptions not applicable here, is that loss of profits from the operation of a business conducted on the property is not an element of recoverable damages in an award pursuant to an eminent domain taking. *Dept. of Trans. v. Byrum*, 82 N.C. App. 96, 98, 345 S.E.2d 416, 418 (1986); *Kirkman v. Highway Comm'n*, 257 N.C. 428, 432, 126 S.E.2d 107, 110 (1962). See also, 4 J. Sackman, *Nichols' The Law of Eminent Domain* § 12B.09[1] (rev. 3d ed. 1993). Both defense witnesses stated that

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they used the capitalization of income approach to determine the value of defendants' land. Under the income approach, an appraiser calculates the economic rent the property earns and deducts normal operating expenses to arrive at net operating income. That figure is then capitalized by a rate of return to determine the fair market value of the property. 5 J. Sackman, *Nichols' The Law of Eminent Domain* § 19.01[2] (rev. 3d ed. 1993). Although the income approach is an accepted method of appraisal, "[i]n assessing the value of property on the basis of income, care must be taken to distinguish between income from the property and income from the business conducted upon the property." 4 J. Sackman, *Nichols' The Law of Eminent Domain* § 12B.09 (rev. 3d ed. 1993).

In *Dept. of Trans. v. Byrum*, 82 N.C. App. 96, 345 S.E.2d 416 (1986), this Court upheld the exclusion of expert testimony using the income approach to determine fair market value, when it was based on the profits of the business on the property. In *Byrum*, defendants' expert testified on *voir dire* that his opinion concerning the fair market value of defendants' land was based primarily on the income approach to valuing commercial property. He admitted on cross-examination, however, that in using the income approach, he did not use the established rental value of the property. Instead, he used the gross income and the profits from the businesses operating on the property to determine the fair market value. This court upheld the trial court's exclusion of the witness' testimony because the witness' method did not distinguish between the rental income of the property, which is a widely accepted factor in determining fair market value, and income from the business being conducted on the property.

The facts here are similar to *Byrum, supra*. Both witnesses testified that they calculated the value of defendants' property by applying a capitalization rate to the net income from defendants' business as reported on their most recent tax return. It is clear that the witnesses' opinions concerning the fair market value of the property were based on the income from the business and not from any rental value attributable to the land. Accordingly, their testimony was inadmissible.

Defendants contend that our decision in *City of Statesville v. Cloaninger*, 106 N.C. App. 10, 415 S.E.2d 111 (1992), allows the use of the income approach based on the net income of the business when there are no comparable sales or comparable rentals in the

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area. In *Cloaninger*, the trial court admitted into evidence schedule F of defendant's tax return relating to defendant's dairy farm business operating on the property. Defendant's expert witnesses testified to the value of the property using the income approach based on the income from defendant's dairy farm business as shown on the tax return. The *Cloaninger* court held that the trial court did not err in allowing defendant's expert witnesses to use the income approach even though it was based on the income of defendant's dairy farm business.

Cloaninger does not control the instant case, however, because *Cloaninger* involved a dairy farm business. It is a well recognized exception that the income derived from a farm may be considered in determining the value of the property. This is so because the income from a farm is directly attributable to the land itself. 4 J. Sackman, *Nichols' The Law of Eminent Domain* § 12B.09[1] (rev. 3d ed. 1993); 5 J. Sackman, *Nichols' The Law of Eminent Domain* § 19.06[3] (rev. 3d ed. 1993). The *Cloaninger* court noted that the city's expert witness stated in his report that the income approach was "most appropriate" since dairy farms are income-producing properties. Accordingly, we view the decision in *Cloaninger* as approving the use of the income approach when there are no comparable sales data and the income upon which the opinion of value is based is directly attributable to the land.

Here, the income from defendants' business was in no way attributable to the land. Defendants had no on-site business on the property. When defendants received telephone calls from customers requesting their plumbing services, they dispatched plumbers from the property to go to the customer. There was no evidence that the real estate contributed in any unique way to the income derived from the business. Defendants could have operated their business from their home or from a downtown office building instead of the premises at issue here without affecting the income from the business.

Defendants further argue that their property falls within the uniqueness exception to the use of the income approach. "Where property is so unique as to make unavailable any comparable sales data, evidence of income has been accepted as a measure of value." 5 J. Sackman, *Nichols' The Law of Eminent Domain* § 19.06[6] (rev. 3d ed. 1993). We note that two of the cases falling under the "uniqueness" exception annotated by *Nichols'* involves the ap-

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propriation of Goat Island of Niagara Falls, *In re State Reservation*, 16 Abb. N. Cas. 159, *aff'd*, 37 Hun. 537, *appeal dismissed*, 102 N.Y. 734, 7 N.E. 916 (1886), and the condemnation of a harbor and ship repair facility in Connecticut, *Wronowski v. Redevelopment Agency of New London*, 180 Conn. 579, 430 A.2d 1284 (1980). 5 J. Sackman, *Nichols' The Law of Eminent Domain* § 19.06[6], note 51 (rev. 3d ed. 1993). The unique nature of an island in Niagara Falls is obvious, and in the case of the harbor and ship facility, the *Wronowski* court found that the property was unique only after no similar property could be found in Connecticut, Massachusetts, or Rhode Island.

Here, the evidence does not support the contention that defendants' property is unique. Although defendants' witnesses testified that there were no comparable land sales, both of plaintiff's expert witnesses testified that they were able to use the cost approach to value defendants' property. The difference is that defendants' witnesses were using the market data approach in which properties with similar size, shape, and improvements are compared to the subject property. It is undisputed that the market data approach could not be used here because there were no comparable land sales with similar size, shape and improvements to the property at issue here. The cost approach used by plaintiff's witnesses, however, values the land as if it were vacant and then adds the depreciated value of the improvements. Plaintiff's witnesses testified that in using the cost approach, they still had to find comparable sales to value the land and they were able to find similar unimproved land for purposes of the cost approach. Defendants' witnesses did not consider using the cost approach and they did not dispute that it could be used. Since there is sufficient comparable sales data available to use the cost approach, defendants' property here does not fall within the "uniqueness" exception.

Finally, defendants contend that plaintiff has waived its objections to witness Mease's testimony because nearly identical testimony from witness McClure was admitted without objection. Generally, the benefit of a seasonably made objection is lost if the same evidence is subsequently admitted without any objection. *Duke Power Co. v. Winebarger*, 300 N.C. 57, 68, 265 S.E.2d 227, 233-34 (1980). However, Rule 46(a)(1) of the N.C. Rules of Civil Procedure states that "when there is objection to the admission of evidence involving a specified line of questioning, it shall be deemed that like objection has been taken to any subsequent admission of evidence

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involving the same line of questioning.” G.S. 1A-1, Rule 46(a)(1). Rule 46(a)(1) does not modify the general rule but preserves the effect of a seasonably made objection to a specified line of questioning. *Id.* A general objection will not come within Rule 46(a)(1) unless the line of questioning objected to is apparent to both the court and the parties. *Butler & Sidbury, Inc. v. Green Street Baptist Church*, 90 N.C. App. 65, 70, 367 S.E.2d 380, 383-84 (1988); *Duke Power Co. v. Winebarger*, 300 N.C. 57, 68, 265 S.E.2d 227, 233-34 (1980).

Here, the “line” of questioning plaintiff objected to was apparent to both the court and the parties. Plaintiff objected six times during Mease’s testimony to questions concerning the net income of defendants’ business. To hold that the trial court was not aware of plaintiff’s objection to this line of questioning would truly exalt form over substance. *Duke Power Co. v. Winebarger*, 300 N.C. 57, 68, 265 S.E.2d 227, 233-34 (1980). *Cf. Badgett v. Davis*, 104 N.C. App. 760, 411 S.E.2d 200 (1991); *McKay v. Parham*, 63 N.C. App. 349, 304 S.E.2d 784 (1983). Accordingly, plaintiff’s objections to that line of questioning were preserved under the rule. Plaintiff’s failure to further object to that line of questioning during witness McClure’s testimony was not error.

For the reasons stated, we reverse the judgment of the trial court and remand to the trial court for a new trial.

Reversed.

Judges ORR and GREENE concur.

CRUMP v. INDEPENDENCE NISSAN

[112 N.C. App. 587 (1993)]

SIDNEY C. CRUMP, PLAINTIFF-EMPLOYEE v. INDEPENDENCE NISSAN, DEFENDANT-EMPLOYER, AND EMPLOYERS MUTUAL CASUALTY COMPANIES, DEFENDANT-CARRIER

No. 9210IC982

(Filed 16 November 1993)

1. Master and Servant § 94 (NCI3d) — full Commission's adoption of deputy's opinion and award — no error — use of Court's format preferable

It was not error for the full Commission to adopt the opinion and award of the deputy commissioner, and the full Commission in substance complied with N.C.G.S. § 97-85; however, it is the better practice for the full Commission, when reviewing an award of a deputy commissioner, to follow a format such as that included in this opinion.

Am Jur 2d, Workers' Compensation § 602.

2. Master and Servant § 94.3 (NCI3d) — agreement for workers' compensation benefits contested after two years — refusal to set aside proper

Where plaintiff entered into an agreement for workers' compensation benefits, accepted all the benefits from it, and chose not to contest it until almost two years after entering the agreement, the Industrial Commission was correct in not setting aside the original award and in denying plaintiff additional benefits under N.C.G.S. § 97-30.

Am Jur 2d, Workers' Compensation §§ 639, 651.

3. Master and Servant § 77.1 (NCI3d) — workers' compensation — no change in employee's condition

Evidence was sufficient to support the Industrial Commission's conclusion that plaintiff did not experience a change of condition, even though plaintiff had been given a disability rating of 15% shortly after his injury and another doctor gave him a 30% disability rating two years after his injury.

Am Jur 2d, Workers' Compensation §§ 612, 652.

Appeal by plaintiff from opinion and award of the North Carolina Industrial Commission filed 1 July 1992. Heard in the Court of Appeals 15 September 1993.

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[112 N.C. App. 587 (1993)]

On 25 May 1987, plaintiff sustained a compensable injury to his back when he changed a tire and picked up a wheel. He was sixty-one years old and was a front-end specialist for defendant auto dealership at the time of his injury. On 30 June 1987, plaintiff saw Dr. James A. Pressly, an orthopedic surgeon. Dr. Pressly concluded that plaintiff suffered from spondylolisthesis and gave him a disability rating of 15%.

Plaintiff returned to Independence Nissan on 21 September 1987 to serve in a supervisory position for less hours and less wages than before the accident. This arrangement continued until plaintiff retired on 19 March 1988, at which time he began receiving social security benefits. He continued to work part-time for defendant in a supervisory capacity for five hours a day, two days a week at a salary of \$125 per week, the maximum amount he could earn without affecting his social security benefits.

On 29 September 1987, several days after returning to work in a supervisory role, plaintiff agreed on Form 26 to accept forty-five weeks of permanent disability compensation at the 15% rating found by Dr. Pressly beginning 31 August 1987. The Commission approved the award on 15 October 1987.

On 27 April 1989, plaintiff requested a hearing pursuant to N.C. Gen. Stat. § 97-47 on the ground that another doctor, who saw plaintiff in 1989, gave him a 30% disability rating. The new doctor commented that the discrepancy with Dr. Pressly's rating was "a difference of opinion." The deputy commissioner who heard the evidence concluded that plaintiff did not sustain a change of condition within the meaning of G.S. § 97-47. The full Commission reviewed the record with reference to plaintiff's assignments of error, concluded there was no adequate ground to amend the award, and adopted the deputy commissioner's opinion and award as its own. From this opinion and award plaintiff appeals.

Seth M. Bernanke for plaintiff appellant.

Caudle & Spears, P.A., by Lloyd C. Caudle and Lisa M. Crotty, for defendant appellees.

ARNOLD, Chief Judge.

[1] Plaintiff first assigns error to the full Commission's adoption of the deputy commissioner's opinion and award. Plaintiff argues that it is not sufficient for the full Commission to merely adopt

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[112 N.C. App. 587 (1993)]

the deputy commissioner's opinion and award and that if the record is not adequate to determine whether or not the deputy commissioner was mistaken in law and fact, then the case should be remanded for further fact finding by the Commission. We disagree.

N.C. Gen. Stat. § 97-85 provides for the review of an award by the full Commission:

If application is made to the Commission within 15 days from the date when notice of the award shall have been given, the full Commission shall review the award, and, if good ground be shown therefor, reconsider the evidence, receive further evidence, rehear the parties or their representatives, and, if proper, amend the award

This statute clearly provides for review of a deputy commissioner's award by the full Commission upon application to the Commission.

In reviewing the deputy commissioner's award, the full Commission has the authority to determine the case from the written transcript of the hearing before the deputy commissioner and the record before it. *Joyner v. Rocky Mount Mills*, 92 N.C. App. 478, 374 S.E.2d 610 (1988). Alternatively, the full Commission shall reconsider the evidence, receive further evidence, or rehear the parties or their representatives "if good ground be shown therefor." G.S. § 97-85. The question of whether "good ground be shown therefor" is a matter within the sound discretion of the full Commission, and the full Commission's determination in that regard will not be reviewed on appeal absent a showing of manifest abuse of that discretion. *Lynch v. M.B. Kahn Constr. Co.*, 41 N.C. App. 127, 254 S.E.2d 236, *disc. review denied*, 298 N.C. 298, 259 S.E.2d 914 (1979). Although the decision to take additional evidence is one within its sound discretion, the full Commission has the duty and responsibility to decide all matters in controversy between the parties, *Joyner*, 92 N.C. App. at 482, 374 S.E.2d at 613, and, if necessary, the full Commission must resolve matters in controversy even if those matters were not addressed by the deputy commissioner. See *Garmon v. Tridair Indus., Inc.*, 14 N.C. App. 574, 188 S.E.2d 523 (1972). Therefore, when the transcript and record before the full Commission is insufficient to resolve all the issues, "the full Commission must conduct its own hearing or remand the matter for further hearing." *Joyner*, 92 N.C. App. at 482, 374 S.E.2d at 613 (emphasis added).

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Upon the record before it, after conducting a further hearing, or after remanding to a deputy commissioner for further hearing, "[t]he Industrial Commission has authority to review, modify, *adopt*, or reject findings of a hearing commissioner" *Garmon*, 14 N.C. App. at 576, 188 S.E.2d at 524 (emphasis added). The full Commission, based on the findings of fact it has modified, adopted, or entered on its own, must then make conclusions of law as to all matters in controversy. Based upon its conclusions of law, the full Commission shall, "if proper," amend the award.

Following an appeal to this Court if the case is remanded to the Commission, the full Commission must strictly follow this Court's mandate without variation or departure. See *D & W, Inc. v. City of Charlotte*, 268 N.C. 720, 152 S.E.2d 199 (1966). Ordinarily upon remand the full Commission can comply with this Court's mandate without the need of an additional hearing, but upon the rare occasion that this Court requires an additional hearing upon remand the full Commission must conduct the hearing without further remand to a deputy commissioner. *Vierегge v. N.C. State Univ.*, 105 N.C. App. 633, 414 S.E.2d 771 (1992). Such an additional hearing without remand to the deputy commissioner avoids an additional delay in cases where the resolution of a plaintiff's claim has already been long delayed. See *Hardin v. Venture Constr. Co.*, 107 N.C. App. 758, 421 S.E.2d 601 (1992).

In this case, the full Commission adopted as its own the opinion and award of the deputy commissioner. Pursuant to a proper review of the award of the deputy commissioner, the full Commission could have adopted the deputy commissioner's findings and entered its own conclusions of law. The full Commission's adoption of the opinion and award here necessarily included an adoption of the deputy commissioner's findings of fact, and the full Commission's finding that no adequate ground existed to amend the award is tantamount to a conclusion of law. In substance, the full Commission has complied with N.C. Gen. Stat. § 97-85, and we hold that it did not err in adopting the opinion and award of the deputy commissioner.

We believe, however, that it would be a better practice for the full Commission, when reviewing an award of a deputy commissioner, to follow a format such as the following.

CRUMP v. INDEPENDENCE NISSAN

[112 N.C. App. 587 (1993)]

)
) OPINION AND AWARD
) By
) Howard Bunn
) Chairman, N.C.
) Industrial Commission

The award by Deputy Commissioner L.B. Shuping, Jr. filed 15 July 1993, is being reviewed by the Full Commission pursuant to N.C. Gen. Stat. § 97-85 upon application by (appealing party).

The undersigned have reviewed the award based upon the record of the proceedings before the deputy commissioner.

The appealing party has (or "has not") shown good ground to

- (a) reconsider the evidence.....;
- (b) receive further evidence.....;
- (c) rehear the parties or their
representatives

The Full Commission adopts all findings of fact found by the deputy commissioner as follows: . . .

(Or "The Full Commission rejects the findings of fact found by the deputy commissioner and finds as follows: . . .")

(Or "The Full Commission modifies the findings of fact found by the deputy commissioner as follows: . . .")

(Or "Based upon further hearing by the Full Commission, the Full Commission finds as follows: . . .")

(Or "The Full Commission remands this case to the deputy commissioner for the following purpose: . . .")

Based upon the findings of fact as found by the deputy commissioner (or "as modified" or "as found by the undersigned"), the Full Commission concludes as follows: . . .

Based upon these conclusions of law, the Full Commission amends the award as follows: . . . (or "has determined there exists no basis for amending the award.")

CRUMP v. INDEPENDENCE NISSAN

[112 N.C. App. 587 (1993)]

This format, which is intended only as a guide, addresses all of the full Commission's duties and options under N.C. Gen. Stat. § 97-85. A clear, concise, and complete opinion and award by the full Commission, moreover, will enable this Court to better understand the full Commission's opinion and award without having to refer back to the deputy commissioner's decision.

[2] Plaintiff also argues that the Commission erred by finding that plaintiff was not entitled to additional benefits under N.C. Gen. Stat. § 97-30 for partial incapacity. We disagree.

Plaintiff and defendant agreed on plaintiff's compensation and submitted the agreement to the Commission for its approval. The Commission approved the agreement, and it thereby became a final award. *Brookover v. Borden, Inc.*, 100 N.C. App. 754, 398 S.E.2d 604 (1990), *disc. review denied*, 328 N.C. 270, 400 S.E.2d 450 (1991). When an employee accepts benefits from an agreement for compensation which was approved by the Commission, the employee may attack and have such agreement set aside only for fraud, misrepresentation, undue influence, or mutual mistake. *Tabron v. Gold Leaf Farms, Inc.*, 269 N.C. 393, 152 S.E.2d 533 (1967). Plaintiff contends that defendant's failure to tell him about benefits provided under G.S. § 97-30 is sufficient reason to set aside the award. That argument was rejected in *Brookover*, and we reject it here as well. Plaintiff entered into an agreement, accepted all the benefits from it, and chose not to contest it until almost two years after entering the agreement. Under these circumstances, the Commission was correct in not setting aside the original award and in denying plaintiff additional benefits under G.S. § 97-30.

[3] Plaintiff finally argues that the Commission erred in concluding that he did not experience a change in condition. Our appellate courts have defined "change of condition" as follows:

Change of condition "refers to conditions different from those existent when the award was made; and a continued incapacity of the same kind and character and for the same injury is not a change of condition . . . the change must be actual, and not a mere change of opinion with respect to a pre-existing condition."

Sawyer v. Ferebee & Son, Inc., 78 N.C. App. 212, 213, 336 S.E.2d 643, 644 (1985). Our role is to determine if the Commission's findings of fact are supported by competent evidence and if the conclusions

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[112 N.C. App. 593 (1993)]

are supported by the findings. *Guy v. Burlington Indus.*, 74 N.C. App. 685, 329 S.E.2d 685 (1985). Plaintiff contends that the findings are not supported by competent evidence. We disagree. After reviewing the record, we found ample competent evidence to support the Commission's findings, and we hold that those findings support the conclusion that plaintiff did not experience a change of condition.

The Commission's opinion and award is affirmed.

Affirmed.

Judges WELLS and JOHNSON concur.

RUBEN JAUREGUI, EMPLOYEE, PLAINTIFF v. CAROLINA VEGETABLES,
EMPLOYER, LIBERTY MUTUAL INSURANCE COMPANY, CARRIER,
DEFENDANTS

No. 9210IC1173

(Filed 16 November 1993)

1. Master and Servant § 94 (NCI3d) — workers' compensation — requirement that Commission make own findings and conclusions

The full Industrial Commission failed to carry out its duties under N.C.G.S. § 97-85 by not making its own findings of fact and conclusions to support its disposition of a workers' compensation claim.

Am Jur 2d, Workers' Compensation §§ 602, 612, 615, 616.

2. Master and Servant § 60.1 (NCI3d) — workers' compensation — living facilities provided by employer — employee not on call — injury while exiting shower not compensable

The "bunkhouse" rule did not apply and plaintiff farm-worker was therefore not entitled to workers' compensation benefits for injuries he sustained when he allegedly slipped on a piece of soap while exiting the shower at living facilities provided by the employer, since the employee was not continuously on call; the connection between plaintiff's employment and his injury was not sufficient to establish that the injury arose out of and in the course of his employment; plain-

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[112 N.C. App. 593 (1993)]

tiff's injury did not take place where his duties were calculated to take him; and plaintiff was not engaged in an activity which was calculated to further, directly or indirectly, his employer's business.

Am Jur 2d, Workers' Compensation § 274.

Appeal by plaintiff from an opinion and award of the North Carolina Industrial Commission entered 1 July 1992. Heard in the Court of Appeals 20 October 1993.

Farmworkers Legal Services of North Carolina, by Maureen A. Sweeney, for plaintiff-appellant.

Cranfill, Sumner & Hartzog, by M. Andrew Avram, for defendants-appellees.

WELLS, Judge.

As a result of plaintiff's claim for compensation under the Workers' Compensation Act, Chapter 97 of the North Carolina General Statutes, a hearing was held before Deputy Commissioner Scott M. Taylor. Following the hearing, Deputy Commissioner Taylor entered an opinion and award denying plaintiff's claim.

Deputy Commissioner Taylor's opinion and award recognized that plaintiff was injured by accident while employed by defendant Carolina Vegetables. The opinion and award contained the following:

FINDINGS OF FACT

1. On 21 June 1990, plaintiff was a 24-year-old man, who was employed by defendant-employer harvesting vegetables. Plaintiff's duties with defendant-employer included picking cucumbers.
2. During the time that plaintiff was employed by defendant-employer, defendant-employer provided plaintiff with free housing in one of their migrant labor camps.
3. Plaintiff testified that on 21 June 1990, he picked cucumbers all day, and got off work at 6:00 p.m. Plaintiff then returned to the migrant labor camp. Plaintiff testified that after he showered, he walked down the steps outside the shower and slipped. When he slipped, plaintiff testified that he saw a little piece of soap. Plaintiff was wearing sandals when he slipped.

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Plaintiff also testified that his weight came down on his left knee when he slipped. Plaintiff subsequently underwent arthroscopic surgery for a medial condylar defect and a medial meniscal tear.

4. The undersigned, however, does not accept plaintiff's testimony as credible, based upon the inconsistencies in plaintiff's testimony and the testimony given by other witnesses and through stipulations.

5. Following his duties with defendant-employer, even though defendant-employer provided on-sight housing, plaintiff was not required to be on the premises, nor was he continuously on call following the end of the workday. At the end of the workday, plaintiff could come and go as he pleased.

6. Plaintiff was free to take a shower or not take a shower any time that he wished following his working hours.

7. Showering was not part of plaintiff's job duties.

8. Plaintiff did not deal in any way with the general public, and did not participate in any way with sales or promotions.

9. Since plaintiff's testimony is not credible, however, plaintiff did not prove that any injury which he may have sustained on or about 21 June 1990 resulted from an interruption of his normal work routine likely to result in unexpected consequences.

★ ★ ★ ★ ★ ★ ★ ★ ★ ★

The foregoing findings of fact and conclusions of law engender the following additional

CONCLUSIONS OF LAW

1. On or about 21 June 1990, plaintiff did not sustain any injury as the result of an interruption of his normal work routine likely to result in unexpected consequences; therefore, any injury sustained by plaintiff on or about 21 June 1990 did not arise out of or in the course of plaintiff's employment with defendant-employer. G.S. § 97-2(6).

2. Plaintiff's claim is not, therefore, compensable under the provisions of the North Carolina Workers' Compensation Act.

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Based upon the foregoing findings of fact and conclusions of law, the undersigned enters the following

ORDER

1. Under the law, plaintiff's claim must be, and the same is hereby DENIED.

. . .

On appeal to the Full Commission, the 1 July 1992 opinion and award was entered with the following disposition:

The undersigned have reviewed the record with reference to the errors alleged and find no adequate ground to amend the award.

In view of the foregoing, the Full Commission ADOPTS as its own the Opinion and Award as filed.

[1] In his first argument on appeal to this Court, plaintiff contends that the Commission failed to carry out its statutory duties pursuant to N.C. Gen. Stat. § 97-85 by not making its own findings of fact and conclusions to support its disposition of plaintiff's claim. We agree. Despite the failure of the Commission to make its own findings and conclusions, for the reasons we shall state, we discern no prejudice to plaintiff.

[2] In another argument, plaintiff contends that Deputy Commissioner Taylor's opinion and award did not make findings of fact sufficient to resolve the issues presented by plaintiff's evidence, particularly with respect to the conditions of plaintiff's employment and the circumstances of his accidental injury. Again, we agree but discern no prejudice.

For the sake of resolving this aspect of plaintiff's appeal, we shall treat plaintiff's testimony as true. The record reveals that after hearing a radio advertisement by Carolina Vegetables, plaintiff left his home in Mexico and traveled to Brownsville, Texas, where he met an agent of Carolina Vegetables, Damian Cruz, who told him that Carolina Vegetables was seeking farm workers. Mr. Cruz said the job paid \$3.85 per hour and Carolina Vegetables would provide housing. Plaintiff testified that he would not have accepted the job had housing not been provided. Mr. Cruz brought 32 farm workers, including plaintiff, to Carolina Vegetables' labor camp located in Duplin County where plaintiff was employed by

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Carolina Vegetables to hand-harvest crops. Showering facilities are provided by Carolina Vegetables, and employees are free to take showers as they wish. Plaintiff testified that on 21 June 1990 he picked cucumbers until 6:00 p.m. and returned to the labor camp to shower. Plaintiff testified that after he showered, as he walked down the steps outside the shower, he slipped on a little piece of soap.

This evidence raises the question of whether plaintiff's injury arose out of his employment and occurred in the course of his employment as N.C. Gen Stat. § 97-2(6) requires. The words "out of" refer to the origin or cause of the accident, and the words "in the course of" refer to the time, place, and circumstances under which the accident occurred. *Bass v. Mecklenburg County*, 258 N.C. 226, 128 S.E.2d 570 (1962). The "course of employment" and "arising out of employment" tests should not be applied entirely independently; they are both parts of a single test to determine the connection between injury and employment. *Watkins v. City of Wilmington*, 290 N.C. 276, 225 S.E.2d 577 (1976).

A claimant is injured in the course of employment when the injury occurs during the period of employment at a place where an employee's duties are calculated to take him, and under circumstances in which the employee is engaged in an activity which he is authorized to undertake and which is calculated to further, directly or indirectly, the employer's business.

Powers v. Lady's Funeral Home, 306 N.C. 728, 295 S.E.2d 473 (1982).

Using *Bass*, *Watkins*, and *Powers* as his springboard, plaintiff urges us to agree with him that the "bunkhouse" rule comports with North Carolina law and thus entitles plaintiff to an award. The "bunkhouse" rule provides:

When an employee is required to live on the premises, either by his contract of employment or by the nature of his employment, and is continuously on call (whether or not actually on duty), the entire period of his presence on the premises pursuant to this requirement is deemed included in the course of employment. However, if the employee has fixed hours of work outside of which he is not on call, compensation is awarded usually only if the course of the injury was a risk associated with the conditions under which claimant lived because of the requirement of remaining on the premises.

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1A Arthur Larson, *The Law of Workmen's Compensation*, § 24.00, at 5-234 (1993). We cannot agree that such a rule comports with North Carolina law.

In *Watkins*, plaintiff was employed by the City of Wilmington as a firefighter. Plaintiff worked 24 hour shifts followed by 24 hours when he was off duty. When on duty, plaintiff slept and ate at the fire station. Plaintiff was injured on duty while making minor repairs to a co-employee's automobile during their lunch hour. This Court affirmed the opinion and award of the Industrial Commission granting plaintiff compensation. In affirming the decision of this Court, our Supreme Court stated:

Acts of an employee for the benefit of third persons generally preclude the recovery of compensation for accidental injuries sustained during the performance of such acts, usually on the ground they are not incidental to any service which the employee is obligated to render under his contract of employment, and the injuries therefore cannot be said to arise out of and in the course of the employment. . . . However, where competent proof exists that the employee understood, or had reasonable grounds to believe that the act resulting in injury was incidental to his employment, or such as would prove beneficial to his employer's interests or was encouraged by the employer in the performance of the act or similar acts for the purpose of creating a feeling of good will, or authorized so to do by common practice or custom, compensation may be recovered, since then a causal connection between the employment and the accident may be established.

Watkins, supra. The Court found there to be competent evidence to support the findings that minor repairs to personal automobiles benefitted the fire department because, by keeping their automobiles in working order, the firefighters could use them to report to duty in case of an emergency.

In *Bass*, plaintiff was employed at the Mecklenburg County Home as a licensed practical nurse and lived on the premises. Plaintiff worked from 7 a.m. until 7 p.m. six days per week. Approximately 20 minutes before her shift was to begin, plaintiff left her room to report to work and while on her way to the main building, she slipped and broke her hip. In affirming the award and holding that plaintiff's injury arose out of and in the course of her employment, our Supreme Court found that

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one, if not the main, purpose of defendant's maintaining a nurses' home on the premises was to secure the proximity of the nurses to the main building in which those under their care lived, so that they would be close by when on duty, and might quickly respond to a call, if needed, at other than regular hours of work. It is manifest that claimant's leaving her home some twenty minutes before she was to go on duty at 7:00 a.m. was required in the efficient performance of her duties of employment to get the reports of the night nurse, so that she could adequately care for those people defendant employed her to nurse.

In *Powers*, plaintiff was employed by Lady's Funeral Home as a mortician and embalmer. On the day plaintiff was injured, he began work at 8:00 a.m. and was to remain at the funeral home or at home on call until 8:00 a.m. the next day. At 2:30 a.m., after embalming a body, plaintiff returned home to shower. Plaintiff was injured when his automobile rolled down the driveway and struck him. The Industrial Commission denied the claim, and this Court affirmed the opinion and award of the Industrial Commission. Our Supreme Court reversed based on the fact that plaintiff's employer required him while on call to shower and change his clothes after embalming a body because plaintiff's personal appearance was intimately related to his employment.

In this case, plaintiff was not continuously on call, and, although the nature of his employment arguably required that he live on the premises, at the time of his injury he was not on call. Therefore, the connection between plaintiff's employment and his injury is not sufficient to establish that the injury arose out of and in the course of plaintiff's employment. Plaintiff's injury did not take place where his *duties* were calculated to take him. The circumstance of residing in quarters furnished by his employer does not translate *ipso facto* into a duty of plaintiff to be there after working hours. Neither was plaintiff engaged in an activity (taking a shower) which was calculated to further, directly or indirectly, his employer's business. It is clear, therefore, that none of the cases plaintiff relies on suggests that there is any precedent in this jurisdiction for us to follow the "bunkhouse" rule, and that without the benefit of that rule, plaintiff cannot prevail.

Affirmed.

Chief Judge ARNOLD and Judge JOHNSON concur.

VANCE v. WILEY T. BOOTH, INC.

[112 N.C. App. 600 (1993)]

ELIZABETH VANCE, PLAINTIFF-APPELLANT v. WILEY T. BOOTH, INCORPORATED, DEFENDANT-APPELLEE

No. 924SC902

(Filed 16 November 1993)

1. Estoppel § 14 (NCI4th)— house transferred by plaintiff to mother—notice to insurer—fire damage—no insurable interest—equitable estoppel inapplicable

Equitable estoppel was not applicable in an action to recover on a policy of fire insurance where defendant agency claimed that plaintiff had no insurable interest in the property in question; plaintiff alleged that defendant knew that plaintiff had transferred the house in question to her mother; plaintiff continued to pay premiums; and the policy did not mention that transfer of the property terminated her insurable interest.

Am Jur 2d, Estoppel and Waiver §§ 134-153.**Comment Note—Quantum or degree of evidence necessary to prove an equitable estoppel. 4 ALR3d 361.****2. Insurance § 728 (NCI4th)— house damaged by fire—no insurable interest in plaintiff**

Plaintiff did not have an insurable interest in a house which was damaged by fire where she neither owned nor lived in it or otherwise possessed it, and she therefore did not suffer a pecuniary loss because of the fire.

Am Jur 2d, Insurance § 938 et seq.**Insurer's waiver of, or estoppel to assert, lack of insurable interest in property insured under fire policy. 91 ALR3d 513.**

Appeal by plaintiff from judgment entered 8 June 1992 by Judge Franklin R. Brown in Duplin County Superior Court. Heard in the Court of Appeals 1 September 1993.

Thompson & Ludlum, by E.C. Thompson, III, for plaintiff-appellant.

Clark, Newton & Hinson, by Reid G. Hinson, for defendant-appellee.

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[112 N.C. App. 600 (1993)]

LEWIS, Judge.

Plaintiff filed a complaint against defendant insurance agency on 26 June 1991 alleging entitlement to fire insurance coverage under a policy issued by defendant. Plaintiff now appeals from summary judgment entered in favor of defendant on 8 June 1992. We affirm on the basis that plaintiff has not shown that she had an insurable interest in the property destroyed by the fire.

The facts are undisputed. On 6 August 1989 plaintiff obtained a fire insurance policy from defendant agency covering a house then owned by plaintiff on Grant Street in Beulaville, North Carolina (the "Grant Street property"). In December 1989 plaintiff divorced her husband and decided to purchase another home. According to plaintiff, because she could not obtain a loan secured by the Farmers Home Administration ("FHA") if she continued to own the Grant Street property, plaintiff deeded that property to her mother at the time the new property was deeded to plaintiff. Plaintiff informed defendant of the transfer of title to her mother, and obtained a new insurance policy on her new home from defendant. Defendant never changed the name on the Grant Street policy to include plaintiff's mother, however. In February 1990 the Grant Street property burned. Defendant denied plaintiff's claim for coverage, explaining that plaintiff had no insurable interest in the property because it was owned by her mother at the time of the fire, and that there was suspicion of arson.

On appeal from summary judgment in favor of defendant, plaintiff argues that defendant should be equitably estopped from denying coverage. Alternatively, plaintiff maintains that she had an insurable interest in the property.

Summary judgment is appropriate when there are no genuine issues of material fact and a party is entitled to judgment as a matter of law. N.C.G.S. § 1A-1, Rule 56(c) (1990). There are no genuine issues of material fact in this case, and we agree with the trial court that defendant is entitled to judgment as a matter of law.

[1] The first issue before us is whether or not equitable estoppel applies to the facts of this case. Plaintiff argues that defendant should be equitably estopped from denying coverage because defendant knew of the title transfer, failed to change the name on the policy, and continued to accept premiums from plaintiff for

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[112 N.C. App. 600 (1993)]

the Grant Street property coverage. Plaintiff argues defendant had a duty to advise her regarding her insurance coverage, and that plaintiff rightfully relied on the coverage after paying the premium and disclosing all the facts to defendant. Plaintiff contends defendant made a representation of coverage by accepting the premium and allowing the policy to remain in her name after being informed of the title change. Plaintiff notes that the policy does not mention that transfer of the property terminates her insurable interest. Thus, she claims she reasonably relied upon the insurance coverage, and should be entitled to the proceeds.

Plaintiff has not supplied us with any caselaw or other authority to support this argument, and we have found nothing to indicate that defendant should be estopped from denying coverage. In an analogous case, an insurance agency had been informed of a transfer of title from a son to his parents, but the agency made no record of the title change and the insurance policy remained in the son's name. The insurance agency denied the parents' claim for coverage, arguing that parents were not covered under the policy and also noting that the son had no insurable interest in the property. The trial court granted summary judgment for the agency, and this Court affirmed. There was no mention of estoppel even though the agency knew of the title change. *Pressley v. American Cas. Co.*, 14 N.C. App. 561, 188 S.E.2d 734, cert. denied, 281 N.C. 623, 190 S.E.2d 466 (1972). We conclude that equitable estoppel is not applicable to the case at hand.

[2] The second issue is whether or not plaintiff had an insurable interest in the Grant Street property. An insurable interest is "essential to the validity of an insurance contract." *N.C. Farm Bureau Mut. Ins. Co. v. Wingler*, 110 N.C. App. 397, 402, 429 S.E.2d 759, 763, disc. rev. denied, 334 N.C. 434, 433 S.E.2d 177 (1993). Our courts have defined an insurable interest as "one which 'furnishes a reasonable expectation of pecuniary benefit from the continued existence of the subject of the insurance.'" *Id.* at 402-03, 429 S.E.2d at 763 (quoting *Collins v. Quincy Mut. Fire Ins. Co.*, 39 N.C. App. 38, 42, 249 S.E.2d 461, 463 (1978), aff'd, 297 N.C. 680, 256 S.E.2d 718 (1979)). Also, an insurable interest exists if the occurrence of the peril insured against would cause a named insured to suffer a pecuniary loss. *Jerome v. Great American Ins. Co.*, 52 N.C. App. 573, 578, 279 S.E.2d 42, 45 (1981); *Harris v. N.C. Farm Bureau Mut. Ins. Co.*, 91 N.C. App. 147, 370 S.E.2d 700 (1988). Title to property is not determinative as to the existence

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[112 N.C. App. 600 (1993)]

of an insurable interest in that property absent a specific condition in the policy. See *Jerome*, 52 N.C. App. at 578, 279 S.E.2d at 45 (lack of ownership does not void policy if no "sole and unconditional ownership clause"); *Pressley*, 14 N.C. App. at 562, 188 S.E.2d at 736 (title alone not enough for recovery); *Harris*, 91 N.C. App. at 151-52, 370 S.E.2d at 703 (lessee has an insurable interest if would suffer pecuniary loss). The issue before us, then, is whether plaintiff suffered a pecuniary loss from the destruction by fire of the Grant Street property even though plaintiff did not hold title to the property at the time of the fire.

If a named insured has possession and the use and enjoyment of the property in question, our courts have allowed recovery even though the named insured is not the title owner to the property. For example, in *Jerome v. Great American Insurance Company*, 52 N.C. App. 573, 279 S.E.2d 42 (1981), this Court held that the named insured, who did not have title to the property in question, suffered a pecuniary loss because he had been using the property as a personal residence for himself and his family at the time of the fire. *Id.* at 578, 279 S.E.2d at 45. In *Jerome*, the named insured had deeded the property to a bank to secure a promissory note. The Court also noted that a grantor retains an insurable interest in property conveyed if the grantor remains personally liable on a debt secured by that property. *Id.*

In *King v. National Union Fire Insurance Company*, 258 N.C. 432, 128 S.E.2d 849 (1963), this Court noted that an equitable interest can constitute an insurable interest. *Id.* at 435, 128 S.E.2d at 852. In that case plaintiff's father informed the insurance agency of his intention to transfer title to plaintiff, who had possession of the property, and the agency accordingly changed the name on the insurance policy to plaintiff's name. However, the father died without conveying the land to plaintiff, thus title remained in the father's name while the insurance policy was in plaintiff's name. *Id.* at 433, 128 S.E.2d at 850. This Court held that plaintiff had an insurable interest, and allowed plaintiff to collect under the policy, explaining that plaintiff had the exclusive use, possession and enjoyment of the house and property, that plaintiff was therefore the beneficial and equitable owner, and that there were no other assertions of title to the house and property. The Court noted that plaintiff enjoyed pecuniary benefit from the house while it existed and suffered pecuniary loss when it was destroyed. *Id.* at 437, 128 S.E.2d at 853.

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[112 N.C. App. 604 (1993)]

The facts in the case at hand do not indicate that plaintiff has an insurable interest. Unlike the situations in the cases discussed above, although plaintiff is the named insured under the policy, plaintiff did not have the use, possession or enjoyment of the Grant Street property at the time of the fire. She had moved her family and possessions to a new home, and the Grant Street property was vacant at the time of the fire. Furthermore, there is no indication, as in *Jerome*, that plaintiff remained personally liable on a debt secured by the Grant Street property. We find that plaintiff did not suffer a pecuniary loss when a house she neither owned nor lived in nor otherwise possessed was damaged by fire. In her brief plaintiff mentions that she may have to pay for repairs and that this constitutes a pecuniary loss. However, as defendant points out, there is nothing in the record which supports this assertion.

Because plaintiff lacked an insurable interest in the property in question, we hereby affirm summary judgment in favor of defendant.

Affirmed.

Judges EAGLES and GREENE concur.

JAMES QUENTIN TAYLOR, PLAINTIFF v. TERRY KENNETH ASHBURN,
DEFENDANT

No. 9221SC1266

(Filed 16 November 1993)

Municipal Corporations § 454 (NCI4th)— fireman sued in official capacity—complaint not specific

Plaintiff's complaint, which alleged that defendant was operating a fire truck in the course and scope of his employment as a fireman for the City when the accident between plaintiff and defendant occurred, alleged a claim against defendant only in his official capacity and not in his individual capacity so that defendant shared in the City's governmental immunity.

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[112 N.C. App. 604 (1993)]

Am Jur 2d, Municipal, County, School, and State Tort Liability § 663.

Appeal by defendant from order entered 29 October 1992 in Forsyth County Superior Court by Judge Judson D. DeRamus, Jr. Heard in the Court of Appeals 26 October 1993.

Peebles & Schramm, by Todd M. Peebles, for plaintiff-appellee.

Womble Carlyle Sandridge & Rice, by Gusti W. Frankel and Dale E. Nimmo, for defendant-appellant.

GREENE, Judge.

Terry Kenneth Ashburn (defendant) appeals from the trial court's denial of his motion for summary judgment on the grounds of sovereign immunity and public officers' immunity in James Quentin Taylor's (plaintiff) negligence action against him.

On 25 September 1989, plaintiff was driving a 1983 Audi automobile on Hawthorne Road in Winston-Salem, North Carolina. Around the same time, defendant, a fire engineer, was operating a fire truck owned by the City of Winston-Salem (the City) and was responding to a fire alarm at a high rise housing complex for the elderly. The fire truck driven by defendant had its emergency equipment—siren, flashing lights, and horn—in full operation. At the intersection of Hawthorne Road and Northwest Boulevard, plaintiff's automobile and defendant's fire truck collided.

On 21 January 1992, plaintiff filed a complaint against defendant, alleging that the accident occurring on 25 September 1989 resulted from defendant's negligent operation of the fire truck and caused plaintiff "substantial bodily injury, property loss, loss of income, and other incidental damages." Although plaintiff did not specify anywhere in his complaint whether he was suing defendant in his individual capacity or in his capacity as a fire engineer for the City, plaintiff alleged in paragraph 4 of his complaint that "[d]efendant was operating an emergency vehicle, to wit: a fire truck owned by the City of Winston-Salem and was operating said vehicle with the permission of the City of Winston-Salem in connection with his employment as a fireman and was in the course and scope of his employment and agency."

On 12 March 1992, defendant filed an answer, and on 9 April 1992, defendant filed an amended answer pleading the affirmative

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defenses of governmental immunity for any claims resulting in damages up to and including \$1,000,000, and of immunity from liability for acts committed in the course and scope of defendant's capacity as a public officer. In an affidavit, Bryce A. Stuart, City Manager of Winston-Salem since January 1980, testified that at the time of the accident between plaintiff and defendant, the City had not purchased liability insurance for tort damages up to \$1,000,000, but did have in effect excess insurance coverage, subject to a \$1,000,000 retention per accident. On 5 October 1992, defendant, based on his affirmative defenses, filed a motion for summary judgment which was denied by the trial court on 29 October 1992.

The issue presented by this appeal is whether plaintiff's complaint, which alleges that defendant was operating a fire truck in the course and scope of his employment as a fireman for the City when the accident between plaintiff and defendant occurred, constitutes suing defendant in his official capacity so that he shares in the City's governmental immunity.

Because the grounds for defendant's motion for summary judgment are governmental immunity and public officers' immunity, the denial of defendant's motion is immediately appealable. *Corum v. University of North Carolina*, 97 N.C. App. 527, 531, 389 S.E.2d 596, 598 (1990), *aff'd in part, rev'd in part, and remanded*, 330 N.C. 761, 413 S.E.2d 276, *reh'g denied*, 331 N.C. 558, 418 S.E.2d 664 (1992); *see Mitchell v. Forsyth*, 472 U.S. 511, 525-26, 86 L. Ed. 2d 411, 424-25 (1985) (denial of substantial claim of absolute immunity, which if successful entitles defendant to immunity from suit rather than mere defense to liability, appealable before final judgment).

To succeed in a summary judgment motion, the movant has the burden of showing, based on pleadings, depositions, answers, admissions, and affidavits, that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law. N.C.G.S. § 1A-1, Rule 56(c) (1990); *Roumillat v. Simplistic Enterprises, Inc.*, 331 N.C. 57, 62-63, 414 S.E.2d 339, 341-42 (1992). Defendant may meet this burden by showing either (1) an essential element of the non-movant's claim is nonexistent, (2) the non-movant cannot produce evidence to support an essential element of his claim, or (3) the non-movant cannot surmount an affirmative defense which

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would bar his claim. *Collingwood v. General Electric Real Estate Equities, Inc.*, 324 N.C. 63, 66, 376 S.E.2d 425, 427 (1989).

Under the doctrine of governmental immunity, a municipality is not liable for the torts of its officers and employees if the torts are committed while they are performing a governmental function, *Herndon v. Barrett*, 101 N.C. App. 636, 640, 400 S.E.2d 767, 769 (1991); *Wiggins v. City of Monroe*, 73 N.C. App. 44, 49, 326 S.E.2d 39, 43 (1985), which includes the organization and operation of a fire department. *Great American Ins. Co. v. Johnson*, 257 N.C. 367, 370, 126 S.E.2d 92, 94 (1962). Any city may, however, waive its immunity from civil tort liability by purchasing liability insurance. N.C.G.S. § 160A-485 (1987). The City purchased liability insurance for claims in excess of \$1,000,000 and since July, 1988, has been self-insured through the City's Risk Acceptance Management Corporation for claims of \$1,000,000 or less. The parties do not dispute and we therefore accept in this case that the City has not waived its governmental immunity for claims of \$1,000,000 or less. See *Blackwelder v. City of Winston-Salem*, 332 N.C. 319, 321-22, 420 S.E.2d 432, 434-35 (1992) (self-funding claims program identical to the one in this case does not waive immunity for claims of \$1,000,000 or less).

Now we address whether defendant shares the City's governmental immunity and is therefore immune from civil liability in this negligence action. Governmental immunity protects the governmental entity and its officers or employees sued in their "official capacity." *Whitaker v. Clark*, 109 N.C. App. 379, 382, 427 S.E.2d 142, 144, *disc. rev. denied and cert. denied*, 333 N.C. 795, 431 S.E.2d 31 (1993). Although a plaintiff generally designates in the caption of his or her complaint in what capacity a defendant is being sued, this caption is not determinative on whether or not a defendant is actually being sued in his or her individual or official capacity. *Stancill v. City of Washington*, 29 N.C. App. 707, 710, 225 S.E.2d 834, 836 (1976) (despite caption of case indicating defendant was only being sued in individual capacity, summary judgment for defendant was proper where examination of complaint and plaintiff's reply to motion for summary judgment showed no allegation of negligence other than with respect to defendant while serving in his official capacity). The court must inspect the text of the complaint as a whole to determine the true nature of the claim. *Lynn v. Clark*, 254 N.C. 460, 461-62, 119 S.E.2d 187, 188 (1961). If the plaintiff fails to advance any allegations in his or her complaint

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other than those relating to a defendant's official duties, the complaint does not state a claim against a defendant in his or her individual capacity, and instead, is treated as a claim against defendant in his official capacity. *Whitaker*, 109 N.C. App. at 383-84, 427 S.E.2d at 145.

In this case, plaintiff's complaint does not mention the words "individual" or "individual capacity" or the words "official" or "official capacity." In paragraph 4 of his complaint, however, plaintiff alleges that "[d]efendant was operating . . . a fire truck owned by the City . . . with the permission of the City . . . in connection with his employment as a fireman and was in the course and scope of his employment and agency." The allegations in plaintiff's complaint concern only defendant's actions while performing his official duties as a fire engineer of driving a fire truck for the City and responding to an emergency call. After review of this language and the complaint as a whole, we hold that plaintiff has asserted a negligence claim against defendant in his official capacity alone, see *Whitaker*, 109 N.C. App. at 383, 427 S.E.2d at 144-45 (where complaint never used words "individual" or "individual capacity," used phrases, "in the performance of their official duties," and "in their official capacity," and overall tenor centered solely on defendants' official duties as employees of state agency, defendants were being sued solely in official capacity); *Dickens v. Thorne*, 110 N.C. App. 39, 46, 429 S.E.2d 176, 180-81 (1993) (allegation in complaint that at all times relevant to action, defendant was officer and employee of county which is responsible for defendant's actions shows defendant is being sued in official capacity alone); therefore, defendant shares in the City's governmental immunity. Furthermore, because we accept plaintiff's statement in his brief that the "City is immune from suit" since it "is without liability insurance for the damages in the complaint," as an admission that his claim does not exceed \$1,000,000, we need not address whether or not defendant is similarly protected by the doctrine of public officers' immunity. Because defendant has met his burden of showing that plaintiff cannot surmount defendant's affirmative defense of governmental immunity which bars plaintiff's claim, the trial court erred in denying defendant's motion for summary judgment. We remand for entry of summary judgment for defendant.

Reversed and remanded.

Judges MARTIN and JOHN concur.

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[112 N.C. App. 609 (1993)]

REBA BALL STANLEY v. W. STEPHEN BROOKS AND RLK, INC. D/B/A BOB KING MITSUBISHI

No. 9221SC1223

(Filed 16 November 1993)

1. Labor and Employment § 235 (NCI4th)— employee's prior criminal history—no knowledge by employer—insufficiency of evidence of negligent hiring

The trial court properly entered summary judgment for defendant on plaintiff's claim of negligent hiring where the individual defendant was a salesman for defendant car dealership; when plaintiff, a potential customer, took a vehicle out on a test drive, the individual defendant allegedly sexually assaulted her; the individual defendant had been charged three years before the incident in question with first-degree sexual offense and first-degree burglary and had pled guilty to lesser charges; but the forecast of evidence failed to show that defendant knew or reasonably could have known of the individual defendant's criminal history prior to the incident with plaintiff.

Am Jur 2d, Master and Servant § 452 et seq.**2. Labor and Employment § 227 (NCI4th)— sexual assault on customer by car salesman during test drive—respondeat superior inapplicable—car dealer not liable to plaintiff**

The trial court properly entered summary judgment for defendant on plaintiff's claim of respondeat superior where the evidence tended to show that the individual defendant, a salesman for defendant car dealership, was exercising the authority vested in him when he took plaintiff for a test drive of an automobile, but when he proceeded to sexually assault her, his actions amounted to intentional tortious conduct designed to carry out his own independent purpose and not that of his employer for which the employer could be held liable.

Am Jur 2d, Master and Servant §§ 430-433.

Liability of employer, other than carrier, for a personal assault upon customer, patron, or other invitee. 34 ALR2d 372.

Appeal by plaintiff from judgment entered 16 September 1992 by Judge William Z. Wood, Jr. in Forsyth County Superior Court. Heard in the Court of Appeals 25 October 1993.

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[112 N.C. App. 609 (1993)]

Viewed in the light most favorable to plaintiff, the evidence tends to show the following: On or about 11 January 1989, the individual defendant, W. Stephen Brooks, applied for employment with defendant Mitsubishi and was hired as a car salesman. Brooks worked at Mitsubishi until November 1989, at which time he went to work for Cloverdale Ford, another automobile dealership located in Forsyth County. He worked at Cloverdale Ford until Mitsubishi reemployed him on 19 April 1990. He continued working at Mitsubishi from April 1990 until January 1991. At all times defendant Brooks alleges that he was one of the top three salesmen for defendant Mitsubishi.

On 26 January 1991, plaintiff, then eighteen years of age, considered purchasing a car from Mitsubishi. She met with defendant Brooks to test drive a Mitsubishi pickup truck. Plaintiff alleged that during the test drive Brooks assaulted her by touching and grabbing her about her arms, hands, groin area, and breasts. He also allegedly exposed his genitals and placed her hand on his private parts. Upon returning from the test drive, Brooks allegedly took plaintiff to the Mitsubishi service department, and again exposed himself and tried to force her to touch him. Plaintiff freed herself from Brooks and left the premises.

At the time of the assault in January 1991, defendant Brooks had been charged in 1988 with first degree sexual offense and first degree burglary, to which he pleaded guilty to lesser charges in February 1989. On 4 June 1991, Brooks was convicted on charges arising out of the incident with plaintiff.

Plaintiff filed a complaint against defendants alleging that as a result of the assault by defendant Brooks she suffered from severe emotional distress. A default judgment was entered against defendant Brooks. Defendant Mitsubishi moved for summary judgment, and the trial court entered a final judgment as to RLK, Inc. d/b/a/ Bob King Mitsubishi on 16 September 1992. Plaintiff appeals from the latter judgment.

Morrow, Alexander, Tash, Long & Black, by C.R. "Skip" Long, Jr., for plaintiff-appellant.

Hutchins, Tyndall, Doughton & Moore, by Richard Tyndall, for defendant-appellee RLK, Inc., d/b/a Bob King Mitsubishi.

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[112 N.C. App. 609 (1993)]

ARNOLD, Chief Judge.

Plaintiff's only assignment of error is that the trial court erred by granting summary judgment in favor of defendant Mitsubishi. She argues that two theories exist from which she has presented sufficient evidence to show a genuine issue of material fact: negligent hiring and respondeat superior. Plaintiff also argues that under a respondeat superior theory and/or a gross negligence theory, a jury could determine that defendant's negligence rises to a level of willful, wanton or reckless disregard of plaintiff's rights, thus supporting an award of punitive damages.

[1] Plaintiff claims that the evidence was sufficient to raise a genuine issue of material fact on her claim of negligent hiring. North Carolina recognizes a claim for negligent hiring when the plaintiff proves:

(1) the specific negligent act on which the action is founded . . . (2) incompetency, by inherent unfitness or previous specific acts of negligence, from which incompetency may be inferred; and (3) *either actual notice to the master of such unfitness or bad habits, or constructive notice, by showing that the master could have known the facts had he used ordinary care in 'oversight and supervision,' . . .*; and (4) that the injury complained of resulted from the incompetency proved.

Walters v. Lumber Co., 163 N.C. 431, 435, 80 S.E. 49, 51 (1913) (quoting Shearman & Redfield on Negligence § 190 (6th ed. 1913)) (emphasis added); *see also Pleasants v. Barnes*, 221 N.C. 173, 19 S.E.2d 627 (1942). Thus, employers of certain establishments can be held liable to an invitee therein assaulted by an employee of the place of business whom the employer "knew, or in the exercise of reasonable care in the selection and supervision of his employees should have known, to be likely, by reason of past conduct, bad temper or otherwise, to commit an assault, even though the particular assault was not committed within the scope of the employment." *Wegner v. Delicatessen*, 270 N.C. 62, 65, 153 S.E.2d 804, 807 (1967).

The Supreme Court has recently addressed the issue of an employer's notice in a case not unlike the case at bar. In *Medlin v. Bass*, 327 N.C. 587, 398 S.E.2d 460 (1990), summary judgment was upheld in favor of defendants Franklin County Board of Education (FCB) and others associated with FCB, who had a claim for

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negligent hiring brought against them by the plaintiff, a minor, who allegedly was sexually assaulted by the school's principal, defendant Bass. The plaintiff contended, *inter alia*, that FCB negligently investigated defendant Bass before hiring him. The evidence showed that before working in the Franklin County Schools, defendant had worked as a teacher and principal in Rocky Mount, North Carolina for ten years. In 1968, a Rocky Mount student alleged that Bass sexually assaulted the student. Although he never confirmed or denied the incident, Bass resigned. The following year FCB hired him after telephoning only one of his references. FCB also sent forms to two other references in accordance with FCB policy, but did not receive them until after hiring Bass. None of these contacts revealed the previous alleged sexual assault. Although rumors surfaced that Bass was a homosexual, these rumors remained unconfirmed and Bass became a FCB principal, having performed his duties in a satisfactory manner for approximately sixteen years at the time of the alleged assault in Franklin County. The Court held that the facts were "devoid of evidence that defendants FCB or [the school superintendent] knew or reasonably could have known of defendant Bass' alleged pedophilic tendencies prior to the incident that is the subject of this lawsuit." *Medlin*, 327 N.C. at 592, 398 S.E.2d at 463.

Plaintiff contends that unlike the defendants in *Medlin*, the defendant here failed to conduct a reasonable investigation of its employee. A presumption exists that an employer has used due care in hiring his employees. *See Pleasants v. Barnes*, 221 N.C. 173, 19 S.E.2d 627. The burden rests with the plaintiff to show that he has been injured as a result of the employer's negligent hiring if the employer had actual or constructive knowledge of the employee's incompetency. *Id.* There is no argument that defendant had actual knowledge of Brooks' criminal past. Furthermore, the record is devoid of any suggestion that defendant had any constructive knowledge of Brooks' past, or that defendant did not exercise due care in hiring Brooks. Although defendant admits that it did not do a criminal record check on Brooks, we believe that it did not have a duty to do so. *See, e.g., Evans v. Morsell*, 284 Md. 160, 395 A.2d 480 (1978) (stating that the majority of courts do not recognize a duty to inquire about an employee's criminal record). Instead, defendant had a sufficient basis to rely upon Brooks because he was re-hired in April 1990, at which time he had a known history of top salesmanship with Mitsubishi and

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good work habits. Moreover, at the second hiring (the time frame in which the assault occurred), Brooks filled out an insurance application in which he responded in the negative to the question "Have you ever been convicted of a fraudulent or dishonest act?" Therefore, as in *Medlin*, the forecast of evidence failed to show that Mitsubishi knew or reasonably could have known of Brooks' criminal history prior to the incident with plaintiff. Since the facts fail to support a material element of negligent hiring summary judgment was therefore proper.

[2] Plaintiff also contends that there is a genuine issue of material fact regarding defendant Mitsubishi's liability under a respondeat superior theory. An employer may be liable under the theory of respondeat superior when the employee's act was either expressly authorized, committed within the scope and in furtherance of the employer's business, or subsequently ratified by the employer. *Medlin*, 327 N.C. 587, 398 S.E.2d 460. "To be within the scope of employment, an employee, at the time of the incident, must be acting in furtherance of the principal's business and for the purpose of accomplishing the duties of his employment." *B.B. Walker Co. v. Burns International Security Services*, 108 N.C. App. 562, 566, 424 S.E.2d 172, 174, *disc. review denied*, 333 N.C. 536, 429 S.E.2d 552 (1993) (quoting *Troxler v. Charter Mandala Center*, 89 N.C. App. 268, 271, 365 S.E.2d 665, 668, *disc. review denied*, 322 N.C. 838, 371 S.E.2d 284 (1988)). Furthermore, "[w]here the employee's actions conceivably are within the scope of employment and in furtherance of the employer's business, the question is one for the jury." *Medlin*, 327 N.C. at 593, 398 S.E.2d at 463. Intentional torts are seldom considered to be within the scope of an employee's employment. *Id.* at 594, 398 S.E.2d at 464.

The alleged sexual assault by defendant Brooks clearly was not within the scope and in furtherance of his employment. The duties of the salespersons at Mitsubishi were to "meet and greet individuals interested in automobiles, help with selection and place the tag on the vehicle after the transaction." While defendant Brooks was exercising the authority vested in him to take plaintiff for a test drive, in proceeding to sexually assault her his actions fell within "the category of intentional tortious acts designed to carry out an independent purpose of defendant [Brooks'] own" *Id.* There was no genuine issue of material fact, therefore, regarding defendant Mitsubishi's derivative liability under a respondeat

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superior theory, and summary judgment for defendant Mitsubishi was proper.

Based on our decision that summary judgment was proper as to defendant's negligence, we need not address plaintiff's final argument on the issue of punitive damages.

Affirmed.

Judges WELLS and JOHNSON concur.

JAMES DAVID BROWN, PLAINTIFF/APPELLANT v. SUSAN ELAINE JONES
BROWN, DEFENDANT/APPELLEE

No. 9218DC1343

(Filed 16 November 1993)

**Pleadings § 64 (NCI4th) — divorce — harassing litigation — imposition
of sanctions proper**

The trial court did not err in making findings of fact which plaintiff alleged were "irrelevant and without substantial evidence in the record to support them," nor did the court abuse its discretion in awarding defendant \$15,000 in sanctions, where there was evidence supporting a finding that plaintiff's complaint failed the legal and factual certification demanded by N.C.G.S. § 1A-1, Rule 11; it was clear that plaintiff filed the complaint to harass defendant and needlessly increase the costs of litigation; plaintiff initiated senseless litigation several times after the parties' separation; though plaintiff claimed that the litigation was part and parcel of his attempts to increase visitation privileges with his son, he did nothing constructive to further that objective; and plaintiff spent \$20,000 trying to recover \$10,000 in attorney's fees.

Am Jur 2d, Pleading § 339.

Appeal by plaintiff from order and judgment entered 3 September 1992 by Judge William L. Daisy in Guilford County District Court. Heard in the Court of Appeals 27 September 1993.

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[112 N.C. App. 614 (1993)]

The Browns were married in 1982 and had one child, David, born of the marriage. On 6 March 1986, Susan Elaine Jones Brown (Mrs. Brown) filed a complaint against her husband, James David Brown (Mr. Brown), seeking a divorce from bed and board, alimony, child support and custody. On 21 April 1986, the parties entered into a separation agreement which settled all real property, personal property and debt divisions between them. On 29 April 1986, Mr. and Mrs. Brown entered into a consent order in which Mrs. Brown waived her claims to a divorce from bed and board and alimony. In addition, Mr. Brown agreed to pay child support for their minor child, for whom custody was awarded to Mrs. Brown. The consent order also entitled Mr. Brown to specified visitation privileges.

On 6 January 1987, Mr. Brown filed a combined "Motion to Divide Undivided Marital Property" and "Motion to Have Facts Relative to Consent Order Established and Preserved". In these motions, Mr. Brown requested that the court order a division of photographs of the child and find facts concerning the consent order. On 4 February 1987, the court dismissed Mr. Brown's motions and awarded attorney's fees and costs to Mrs. Brown.

On 1 June 1987, Mrs. Brown filed a "Motion in the Cause for Contempt and for Temporary Restraining Order". This motion requested, among other things, that Mr. Brown be held in willful contempt of an order of the court and that a preliminary injunction be entered ordering Mr. Brown to refrain from contacting Mrs. Brown, their child, or any other third persons associated with them. A temporary restraining order was issued pursuant to Mrs. Brown's motion. Following a show cause hearing, Mrs. Brown's motions were dismissed.

On 21 February 1989, Mr. Brown filed a complaint seeking a declaration of rights under a provision in the separation agreement entitled "Remedies for Breach". Mrs. Brown counterclaimed seeking both compensatory and punitive damages for breaches of the separation agreement by Mr. Brown due to a pattern of harassment and molestation. On 8 January 1990, the trial court dismissed both Mr. Brown's complaint and Mrs. Brown's counterclaim and denied attorney's fees and costs to either party.

On 5 November 1991, Mr. Brown filed a complaint against Mrs. Brown requesting that he recover damages in excess of \$10,000.00 for breaches of their separation agreement, reasonable

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attorney's fees for filing the complaint, and that costs of the action be taxed against Mrs. Brown. In his complaint, Mr. Brown alleged that he had been the prevailing party under their separation agreement in earlier actions and was thus entitled to the attorney's fees as specified in the remedies provision of that agreement. The remedies provision reads as follows:

REMEDIES FOR BREACH: If either party fails in the due performance of his or her obligation hereunder, the other party shall have the right, at his or her election, to sue for damages for breach of this Agreement, to sue for specific performance of this Agreement, or to rescind the Agreement and seek such legal remedies as may be available to him or her. In any such suit or proceeding, the party deemed to be the defaulting party shall be liable for the attorney's fees of the party deemed to be the prevailing party.

Mrs. Brown responded by filing a motion to dismiss the complaint for failure to state a claim on 6 January 1992. In her answer, filed on 20 March 1992, she asserted several affirmative defenses, including *res judicata*, collateral estoppel, statute of limitations and, again, failure to state a claim under Rule 12(b)(6). Mrs. Brown also moved for summary judgment, along with sanctions and attorneys' fees pursuant to both N.C. Gen. Stat. § 1A-1, Rule 11 (1990) and N.C. Gen. Stat. § 6-21.5 (1986).

On 5 June 1992, the trial court ordered the dismissal of Mr. Brown's complaint pursuant to Rule 12(b)(6) and set a hearing for the Rule 11 motions. On 3 September 1992, the trial court awarded Mrs. Brown \$15,000 in sanctions after concluding that (1) Mr. Brown's complaint was not well grounded in fact or warranted by existing law, and (2) interposed for an improper purpose. From the order awarding Mrs. Brown sanctions under Rule 11, Mr. Brown appeals.

David F. Tamer for plaintiff-appellant.

Clark Wharton & Berry, by David M. Clark and Virginia S. Schabacker, for defendant-appellee.

ARNOLD, Chief Judge.

In his first assignment of error, Mr. Brown contends the district court erred in making findings of fact which were "irrelevant and without substantial evidence in the record to support them." We disagree. Pursuant to Rule 11, the signer makes three certifications.

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They are that the pleading is (1) well grounded in fact, (2) warranted by existing law, and (3) not interposed for an improper purpose. *Bryson v. Sullivan*, 330 N.C. 644, 412 S.E.2d 327 (1992). In *Turner v. Duke University*, our Supreme Court set the applicable standard for appellate review of the granting or denial of sanctions under Rule 11 as follows:

The trial court's decision to impose or not to impose mandatory sanctions under N.C.G.S. § 1A-1, Rule 11(a) is reviewable *de novo* as a legal issue. In the *de novo* review, the appellate court will determine (1) whether the trial court's conclusions of law support its judgment or determination, (2) whether the trial court's conclusions of law are supported by its findings of fact, and (3) whether the findings of fact are supported by a sufficiency of the evidence. If the appellate court makes these three determinations in the affirmative, it must uphold the trial court's decision to impose or deny the imposition of mandatory sanctions under N.C.G.S. § 1A-1, Rule 11(a).

Turner v. Duke Univ., 325 N.C. 152, 165, 381 S.E.2d 706, 714 (1989).

The trial court's order contains fifteen evidentiary findings of fact and two ultimate findings of fact, all of which amply support the court's findings. In particular, the evidence supports a finding that Mr. Brown's complaint failed the legal and factual certification demanded by Rule 11. In addition, it is clear that Mr. Brown filed the complaint to harass Mrs. Brown and needlessly increase the costs of litigation. Senseless litigation initiated by Mr. Brown has persisted since the parties' separation in 1986. While Mr. Brown claims the litigation is part and parcel of his attempts to increase visitation privileges with his son, he has done nothing constructive to further that objective. Testimony indicated that he has spent \$20,000 trying to recover \$10,000 in attorney's fees.

Mr. Brown also argues that the trial court erred in imposing the \$15,000 sanction. We disagree. In *Turner*, the Court stated "in reviewing the appropriateness of the particular sanction imposed, an 'abuse of discretion' standard is proper." *Id.* This Court has also stated that "this standard is intended to give great leeway to the trial court and a clear abuse of discretion must be shown." *Central Carolina Nissan, Inc. v. Sturgis*, 98 N.C. App. 253, 264, 390 S.E.2d 730, 737, *disc. review denied*, 327 N.C. 137, 394 S.E.2d 169 (1990). The trial court considered evidence of fees incurred by Mrs. Brown, along with Mr. Brown's conduct throughout the

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proceedings in determining an appropriate sanction. The trial court did not abuse its discretion.

Mrs. Brown has also presented two cross-assignments of error for our review. In her first cross-assignment of error, Mrs. Brown contends the court erred at the hearing in arbitrarily limiting evidence that would have further supported the order. In light of our decision to affirm the court's order, it is unnecessary to address this cross-assignment. In her second cross-assignment of error, Mrs. Brown contends the court erred in failing to issue sanctions against Mr. Brown's attorney as well. We note that Mrs. Brown did not appeal from the order. This challenge is not properly raised by cross-assignments of error under Rule 10(d) of the Rules of Appellate Procedure as that rule is reserved for errors which deprived the appellee of an alternative basis in law to support the judgment. This cross-assignment of error is more properly the subject of a cross-appeal. Mrs. Brown did not appeal, therefore this argument is not before the court.

Finally, we conclude that Mr. Brown brought this appeal for an improper purpose and that it represents yet another attempt to harass Mrs. Brown and needlessly increase costs in this senseless, protracted litigation. Furthermore, this appeal is not well grounded in fact, nor is it warranted by existing law. Accordingly, we remand this case to the district court for a sanctions hearing against Mr. Brown pursuant to Rule 34 of our appellate rules. We strongly encourage the trial court to compensate Mrs. Brown for any expenses incurred in defending against this frivolous appeal, in addition to imposing a sanction the trial court feels is appropriate to deter future abuses by Mr. Brown. We note that this hearing should encompass both this appeal and its companion appeal, No. 9218DC1019.

Accordingly, the order of the trial court is affirmed and this case is remanded for a hearing pursuant to Rule 34 of the appellate rules.

Affirmed and remanded.

Judges LEWIS and WYNN concur.

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[112 N.C. App. 619 (1993)]

JAMES DAVID BROWN v. SUSAN ELAINE JONES BROWN

No. 9218DC1019

(Filed 16 November 1993)

Divorce and Separation § 520 (NCI4th)— separation agreement— remedies provision—unambiguous language—no failure to perform—complaint properly dismissed

There was no merit to plaintiff's contention that he had been the prevailing party under the parties' separation agreement in earlier actions and was thus entitled to the attorney's fees as specified in the remedies provision of that agreement, since the language of the remedies provision was unambiguous; a party must have failed at some performance under the separation agreement in order for the other party to be a prevailing party; no failure to perform under that agreement appeared from the face of the complaint; and the trial court therefore properly dismissed the complaint.

Am Jur 2d, Divorce and Separation §§ 829, 838 et seq.

Appeal by plaintiff from judgment entered 6 May 1992 by Judge William L. Daisy in Guilford County District Court. Heard in the Court of Appeals 27 September 1993.

The Browns were married in 1982 and had one child, David, born of the marriage. On 6 March 1986, Susan Elaine Jones Brown (Mrs. Brown) filed a complaint against her husband, James David Brown (Mr. Brown), seeking a divorce from bed and board, alimony, child support and custody. On 21 April 1986, the parties entered into a separation agreement which settled all real property, personal property and debt divisions between them. On 29 April 1986, Mr. and Mrs. Brown entered into a consent order in which Mrs. Brown waived her claims to a divorce from bed and board and alimony. In addition, Mr. Brown agreed to pay child support for their minor child, for whom custody was awarded to Mrs. Brown. The consent order also entitled Mr. Brown to specified visitation privileges.

On 6 January 1987, Mr. Brown filed a combined "Motion to Divide Undivided Marital Property" and "Motion to Have Facts Relative to Consent Order Established and Preserved". In these motions, Mr. Brown requested that the court order a division of

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photographs of the child and find facts concerning the consent order. On 4 February 1987, the court dismissed Mr. Brown's motions and awarded attorney's fees and costs to Mrs. Brown.

On 1 June 1987, Mrs. Brown filed a "Motion in the Cause for Contempt and for Temporary Restraining Order". This motion requested, among other things, that Mr. Brown be held in willful contempt of an order of the court and that a preliminary injunction be entered ordering Mr. Brown to refrain from contacting Mrs. Brown, their child, or any other third persons associated with them. A temporary restraining order was issued pursuant to Mrs. Brown's motion. Following a show cause hearing, Mrs. Brown's motions were dismissed.

On 21 February 1989, Mr. Brown filed a complaint seeking a declaration of rights under a provision in the separation agreement entitled "Remedies for Breach". Mrs. Brown counterclaimed seeking both compensatory and punitive damages for breaches of the separation agreement by Mr. Brown due to a pattern of harassment and molestation. On 8 January 1990, the trial court dismissed both Mr. Brown's complaint and Mrs. Brown's counterclaim and denied attorney's fees and costs to either party.

On 5 November 1991, Mr. Brown filed a complaint against Mrs. Brown requesting that he recover damages in excess of \$10,000.00 for breaches of their separation agreement, reasonable attorney's fees for the filing of the complaint, and that costs of the action be taxed against Mrs. Brown. In his complaint, Mr. Brown alleged that he had been the prevailing party under their separation agreement in earlier actions and was thus entitled to the attorney's fees as specified in the remedies provision of that agreement. The remedies provision reads as follows:

REMEDIES FOR BREACH: If either party fails in the due performance of his or her obligation hereunder, the other party shall have the right, at his or her election, to sue for damages for breach of this Agreement, to sue for specific performance of this Agreement, or to rescind the Agreement and seek such legal remedies as may be available to him or her. In any such suit or proceeding, the party deemed to be the defaulting party shall be liable for the attorney's fees of the party deemed to be the prevailing party.

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Mrs. Brown responded by filing a motion to dismiss the complaint for failure to state a claim on 6 January 1992. In her answer, filed on 20 March 1992, she asserted several affirmative defenses, including *res judicata*, collateral estoppel, statute of limitations and, again, failure to state a claim under Rule 12(b)(6). Mrs. Brown also moved for summary judgment, along with sanctions and attorneys' fees pursuant to both N.C. Gen. Stat. § 1A-1, Rule 11 (1990) and N.C. Gen. Stat. § 6-21.5 (1986).

On 5 June 1992, the trial court ordered the dismissal of Mr. Brown's complaint pursuant to Rule 12(b)(6) and set a hearing for the Rule 11 motions. On 3 September 1992, the trial court awarded Mrs. Brown \$15,000 in sanctions after concluding that (1) Mr. Brown's complaint was not well grounded in fact or warranted by existing law, and (2) interposed for an improper purpose. From the judgment dismissing his complaint, Mr. Brown appeals. Mr. Brown has also appealed the issuance of Rule 11 sanctions against him. That appeal, however, is addressed separately in No. 9218DC1343.

David F. Tamer for plaintiff-appellant.

Clark Wharton & Berry, by David M. Clark and Virginia S. Schabacker, for defendant-appellee.

ARNOLD, Chief Judge.

In his sole argument on appeal, Mr. Brown argues the district court erred in dismissing his complaint pursuant to Rule 12(b)(6) of the Rules of Civil Procedure. Mr. Brown contends that his complaint stated a claim upon which relief could be granted and that the court should have allowed the case to proceed to trial. In reviewing a dismissal under Rule 12(b)(6), this Court is guided by the following principles:

The test on a motion to dismiss for failure to state a claim upon which relief can be granted is whether the pleading is legally sufficient. A legal insufficiency may be due to an absence of law to support a claim of the sort made, absence of fact sufficient to make a good claim or the disclosure of some fact which will necessarily defeat the claim. When making a ruling under this rule, the complaint must be viewed as admitted and on that basis the court must determine as a matter of law whether the allegations state a claim for which relief may be granted.

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[112 N.C. App. 619 (1993)]

State of Tennessee v. Environmental Management Comm., 78 N.C. App. 763, 765, 338 S.E.2d 781, 782 (1986) (citations omitted).

This appeal arises from Mr. Brown's confusion concerning the meaning of the "Remedies for Breach" provision in the parties' separation agreement and the rights it confers. The provision has been set out in full above and need not be repeated here. At the hearing on the Rule 12(b)(6) motion, Judge Daisy stated, "I don't think the language of the Separation Agreement is ambiguous . . . and I don't think it pertains to the outcome of the 1986 case, so I'm going to grant the 12(b)(6) motion."

We agree with the trial court and affirm the dismissal of Mr. Brown's complaint. We also believe the language of the remedies provision is unambiguous. A party must have failed at some performance under the separation agreement in order for the other party to be a prevailing party. Any such failure or default does not appear from the face of Mr. Brown's complaint. Moreover, Mrs. Brown's actions, often little more than defensive gestures, cannot be construed as a "failure in the due performance" of her obligations under the separation agreement. Furthermore, she does not become a defaulting party by virtue of these actions. Thus, the trial judge properly dismissed the complaint.

The trial court's order dismissing this action is affirmed.

Affirmed.

Judges LEWIS and WYNN concur.

JOHNSON v. N.C. FARM BUREAU INS. CO.

[112 N.C. App. 623 (1993)]

DAVID A. JOHNSON AND CHARLENE JOHNSON, PLAINTIFFS v. NORTH
CAROLINA FARM BUREAU INSURANCE COMPANY AND JOHN DOE,
DEFENDANTS

No. 9230SC1049

(Filed 16 November 1993)

**Insurance § 511 (NCI4th) — injury caused by unknown motorist — no
contact with insured — no uninsured or underinsured coverage —
recovery from out-of-state carrier — no effect on coverage**

Business and personal insurance policies issued by defendant to plaintiff did not provide uninsured or underinsured coverage for injuries sustained by plaintiff when the automobile in which he was a passenger was forced off the road by an unknown motorist, since plaintiff was injured without making contact with the unknown motorist's vehicle; an uninsured carrier is not obligated to pay uninsured proceeds when there is no contact between its insured and an unknown motorist's vehicle, nor would the underinsured carrier be liable because the unknown driver is not an underinsured motorist; and payment of uninsured proceeds by the automobile owner's insurance company located in another state where contact is not required between insured and the unknown motorist should not expose another insurance company to the risks which the contact requirement was designed to eliminate.

Am Jur 2d, Automobile Insurance § 330 et seq.

Appeal by plaintiffs from judgment entered 20 August 1992 by Judge Robert D. Lewis in Cherokee County Superior Court. Heard in the Court of Appeals 29 September 1993.

Plaintiff David Johnson was seriously injured when the automobile in which he was a passenger was forced off the road by an unknown motorist. Plaintiff and the automobile's owner, Anna, were travelling on a mountain road near Murphy, North Carolina, when the unknown motorist approached them from ahead and crossed the center line. In an attempt to avoid a collision Anna swerved to the side of the road and as a result lost control of her automobile. The automobile rolled down an embankment and stopped after hitting a concrete culvert. Plaintiff, Anna, and another driver saw the unknown motorist, but they could not give police enough information to identify him.

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[112 N.C. App. 623 (1993)]

Anna was insured by Clarendon National Insurance Company (Clarendon) under a policy with liability limits of \$25,000 per person. Plaintiff submitted a claim to Clarendon, claiming that Anna negligently operated her automobile and caused his injuries. Clarendon denied Anna's negligence, and plaintiff thereafter submitted a claim for uninsured coverage under the Clarendon policy. Clarendon and plaintiff settled when Clarendon offered the full amount of its liability under the uninsured provision.

Plaintiff then submitted a claim to North Carolina Farm Bureau Insurance Company (Farm Bureau) for uninsured and underinsured coverage on his business and personal insurance policies. The limits of uninsured and underinsured liability under plaintiff's policies with Farm Bureau were \$100,000 under the business policy and \$50,000 per person/\$100,000 per occurrence under the personal policy. Farm Bureau denied liability under both the uninsured and underinsured provisions, and plaintiff instituted this action seeking a declaratory judgment that Farm Bureau was liable for either uninsured or underinsured coverage. Plaintiff's wife was joined as a plaintiff seeking damages for loss of consortium. On the declaratory judgment claim, the trial judge ruled in favor of Farm Bureau, finding that the policies did not provide uninsured or underinsured coverage. The trial judge then entered summary judgment in favor of Farm Bureau. Plaintiffs appeal from this judgment.

Lindsay & True, by Ronald C. True, for plaintiff appellants.

Willardson & Lipscomb, by William F. Lipscomb, for defendant appellee Farm Bureau.

ARNOLD, Chief Judge.

Plaintiffs argue that N.C. Gen. Stat. § 20-279.21 and the two Farm Bureau policies provide for underinsured coverage under these facts and that the trial court erred by ruling otherwise. We disagree.

An underinsured motor vehicle is "a highway vehicle with respect to the ownership, maintenance, or use of which, the sum of the limits of liability under all bodily injury liability bonds and insurance policies applicable at the time of the accident is less than the applicable limits of liability under the owner's policy." G.S. § 20-279.21(b)(4). Underinsured insurance is derivative in nature and depends upon the insured having a legal claim against a negligent

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tort-feasor operating an underinsured motor vehicle and the exhaustion of the underinsured operator's liability insurance. *Silvers v. Horace Mann Ins. Co.*, 324 N.C. 289, 378 S.E.2d 21 (1989). Uninsured coverage, on the other hand, is available when an insured plaintiff is injured by a motor vehicle with no liability insurance or with liability insurance in an amount less than our state's statutory minimum. G.S. § 20-279.21(b)(3).

An unidentified motor vehicle, such as the one which caused plaintiffs' damages, is statutorily treated as an uninsured motor vehicle. *Id.* Plaintiffs are, therefore, faced with two barriers to recovery under the underinsured provisions of the policies: (1) there was no exhaustion of an underinsured tort-feasor's liability insurance, a prerequisite to payment of underinsured proceeds, and (2) the motor vehicle that caused the injuries is deemed an uninsured motor vehicle by statute. Plaintiffs apparently acknowledge these deficiencies, but present us with a unique argument. Plaintiffs' theory depends upon a mutated definition of underinsured motor vehicle. Because underinsured coverage depends upon the exhaustion of an underinsured tort-feasor's liability coverage, plaintiffs argue that the uninsured coverage they received is a substitute for the unknown motorist's liability coverage. Thus, plaintiffs argue that the uninsured motor vehicle in this case was transformed into an underinsured motor vehicle when Anna's uninsured carrier paid out its policy limits.

We disagree with plaintiffs' reasoning. The legislature never intended for G.S. §§ 20-279.21(b)(3) and (4) to provide coverage in this situation. Plaintiff David Johnson was injured by an unknown uninsured motorist without making contact with the unknown motorist's vehicle. An uninsured carrier is not obligated to pay uninsured proceeds when there is no contact between its insured and an unknown motorist's vehicle, *Andersen v. Baccus*, 109 N.C. App. 16, 426 S.E.2d 105, *disc. review allowed*, 333 N.C. 574, 429 S.E.2d 568 (1993); *Petteway v. South Carolina Ins. Co.*, 93 N.C. App. 776, 379 S.E.2d 80, *disc. review denied*, 325 N.C. 273, 384 S.E.2d 518 (1989), nor would the underinsured carrier be liable because the unknown driver is not an underinsured motorist. G.S. § 20-279.21(b)(3). Under normal circumstances then, plaintiffs would be left without recovery, a point which plaintiffs concede. This situation arose apparently only because Clarendon is a Florida insurance company, and in Florida there is no requirement of contact before an insured may recover uninsured proceeds.

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[112 N.C. App. 626 (1993)]

The fortuitous payment of uninsured proceeds should not change the result under our statutory scheme which provides no coverage in this situation. The contact requirement was developed to protect insurance companies from fraudulent hit and run claims that were actually caused by the insured's negligence. *Andersen*, 109 N.C. App. at 20, 426 S.E.2d at 108 (citing *McNeil v. Hartford Accident and Indemn. Co.*, 84 N.C. App. 438, 442, 352 S.E.2d 915, 917 (1987)). Similar concerns arise here, where the only difference is that plaintiffs received insurance proceeds from an uninsured carrier. Payment of uninsured proceeds from one insurance company should not expose another insurance company to the risks which the contact requirement was designed to eliminate. The trial court's judgment is affirmed.

Affirmed.

Judges WYNN and JOHN concur.

STATE OF NORTH CAROLINA v. STACY RICHARD PHIPPS

No. 934SC219

(Filed 16 November 1993)

**Cemeteries and Burial § 23 (NC14th)— desecration of grave—
presence of deceased body required**

The presence of a deceased body is an essential element of the crime of defacing or desecrating a grave under N.C.G.S. § 14-148(a)(2), and to prove a violation of this statute, the State must prove not only that the defendant willfully performed an act proscribed by the statute, but that a deceased person was interred in the cemetery at the time the proscribed act was committed.

Am Jur 2d, Cemeteries § 44.

**Liability for desecration of graves and tombstones. 77
ALR4th 108.**

STATE v. PHIPPS

[112 N.C. App. 626 (1993)]

Appeal by defendant from judgment entered 28 August 1992 in Sampson County Superior Court by Judge Milton Read. Heard in the Court of Appeals 19 October 1993.

Attorney General Michael F. Easley, by Assistant Attorney General Valerie L. Bateman, for the State.

Philip E. Williams for defendant-appellant.

GREENE, Judge.

Stacy Richard Phipps (defendant) appeals his conviction for defacing a grave site in violation of N.C. Gen. Stat. § 14-148(a)(2).

The body of George Washington Hudson was interred in a mausoleum on the grounds of the George Washington Hudson Cemetery in Turkey, North Carolina, in 1958. The cemetery is set off from other land by a brick border. In 1976, Mr. Hudson's body was moved to the Grand View Memorial Cemetery in Clinton to be buried next to his wife, who had passed away that year, and the mausoleum was removed. With the exception of the interment of Mr. Hudson's body from 1958 to 1976, no other person has ever been interred on the grounds of the George Washington Hudson Cemetery. After Mr. Hudson's body was removed in 1976, the cemetery consisted of the brick border around the cemetery, a brick slab upon which the mausoleum had sat, and Mr. Hudson's headstone, which lay face down in the ground near the brick slab.

In April, 1992, Mr. Hudson's son, David Dwight Hudson Sr., noticed that portions of the brick border were missing and the headstone had been knocked out of the ground. He further noticed markings where a tractor had been driven across the lot and that some of the bricks making up the border of the George Washington Hudson Cemetery had been damaged by a tractor being driven over them. During one visit to the cemetery, Dwight Hudson observed defendant driving his tractor near the George Washington Hudson Cemetery. When asked by Dwight Hudson if he had attempted to dig up the headstone, defendant stated that he had run over it with his tractor and his disk had knocked it out of the ground. Defendant further admitted that he had removed some of the bricks which made up the border around the cemetery. There is no evidence that defendant had permission to remove the bricks or to damage the bricks by driving his tractor over them.

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[112 N.C. App. 626 (1993)]

Defendant was arrested and charged with two counts of defacing a grave site in violation of N.C. Gen. Stat. § 14-148(a)(2) and one count of defacing a grave site in violation of Section 14-148(a)(3). At the close of all the evidence, defendant moved to have the charges dismissed, but this motion was denied. A jury convicted defendant of one count of defacing a grave site in violation of Section 14-148(a)(2) and defendant was sentenced to a sixty-day suspended sentence and three years probation.

The dispositive issue is whether it is an element of the offense created by N.C. Gen. Stat. § 14-148(a)(2) that a deceased person be interred in the cemetery.

N.C. Gen. Stat. § 14-148(a)(2) makes it unlawful to willfully:

- (2) Take away, disturb, vandalize, destroy or change the location of any stone, brick, iron or other material or fence enclosing a cemetery without authorization of law or *consent of the surviving spouse or next of kin of the deceased* thereby causing damage of less than one thousand dollars (\$1,000);

N.C.G.S. § 14-148(a)(2) (1986) (emphasis added).

Defendant argues that because all of the evidence presented at trial showed that no deceased person was interred in the cemetery, the State has not proven all of the essential elements of the crime charged, and defendant's conviction must therefore be reversed. We agree.

The language of N.C. Gen. Stat. § 14-148(a)(2) is inherently ambiguous. The word "cemetery" is defined as a "place or area set apart for the interment of the dead." *Black's Law Dictionary* 282 (4th ed. 1968). This definition does not require that dead persons actually be interred in the place or area for the place or area to be a cemetery. Such a reading of the word "cemetery" conflicts with the language "without . . . consent of the surviving spouse or next of kin of the deceased," which, as used in N.C. Gen. Stat. § 14-148(a)(2), points to an assumption on the part of the legislature that a deceased person be interred in the cemetery, because one could not obtain the consent of the deceased's surviving spouse or next of kin if there is no deceased.

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Where a statute contains ambiguities, a reviewing court must attempt to discern and effectuate the intent of the legislature, utilizing accepted rules of statutory construction. *See Young v. Whitehall Co., Inc.*, 229 N.C. 360, 367, 49 S.E.2d 797, 801 (1948) (“[C]ourt must resort to construction to ascertain the legislative will.”). One of the recognized rules of construction is that where the words of a statute have not acquired a technical meaning, they must be construed in accordance with their common and ordinary meaning unless a different meaning is apparent or definitely indicated by the context. *State v. Lee*, 277 N.C. 242, 243, 176 S.E.2d 772, 773 (1970).

Although the common and ordinary meaning of the word “cemetery” does not require that a deceased person be interred at a site for that site to be a cemetery, it is apparent that the legislature, by its inclusion of the phrase “without . . . consent of the surviving spouse or next of kin of the deceased,” intended the word “cemetery,” as used in the context of N.C. Gen. Stat. § 14-148(a)(2), to mean an area where a deceased person or persons are in fact interred. As such, the presence of a deceased body is an essential element of the crime of defacing or desecrating a grave under N.C. Gen. Stat. § 14-148(a)(2) and to prove a violation of this statute, the State must prove not only that the defendant willfully performed an act proscribed by the statute, but that a deceased person was interred in the cemetery at the time the proscribed act was committed.

In this case, there was uncontradicted evidence that there was in fact no deceased person interred in the George Washington Hudson Cemetery at the time defendant removed or damaged the bricks making up the border of the cemetery. As such, the State failed to prove an essential element of the crime charged. Defendant’s motion to dismiss was therefore improperly denied and defendant’s conviction must be reversed.

Reversed.

Judges MARTIN and JOHN concur.

NORTHWOOD HOMEOWNERS ASSN. v. TOWN OF CHAPEL HILL

[112 N.C. App. 630 (1993)]

NORTHWOOD HOMEOWNERS ASSOCIATION, INC., PETITIONER v. TOWN
OF CHAPEL HILL AND CHAPEL HILL NORTH LIMITED PARTNERSHIP,
RESPONDENTS

No. 9215SC535

(Filed 16 November 1993)

**Appeal and Error § 421 (NCI4th)— failure to follow Rules of
Appellate Procedure—appeal dismissed**

Petitioner's appeal is dismissed for violating N.C.R. App. P. Rule 28(b)(4) and Rule 28(b)(5) by intertwining the statement of facts, three questions for review, and all arguments.

Am Jur 2d, Appeal and Error § 691 et seq.

Appeal by petitioner from order entered 19 December 1991 by Judge Donald W. Stephens in Orange County Superior Court. Heard in the Court of Appeals 27 April 1993.

Grainger R. Barrett for petitioner-appellant.

Ralph D. Karpinos for respondent-appellee Town of Chapel Hill.

Michael B. Brough & Associates, by Michael B. Brough, for respondent-appellee Chapel Hill North Limited Partnership.

JOHNSON, Judge.

On 22 April 1991, the Chapel Hill Town Council (Council) voted to approve, by a 5-3 vote, a Special Use Permit for development of a forty (40) acre tract of land known as Chapel Hill North. This site is bounded generally by I-40 on the north, N.C. 86 on the west, Weaver Dairy Road on the south, and Perkins Drive on the east. This site is zoned "Mixed Use—Office and Institutional" by respondent Town of Chapel Hill. Petitioner is Northwood Homeowners Association, Inc. of Northwood subdivision which is located directly across N.C. 86 from the proposed Chapel Hill North site.

Petitioner filed a petition for writ of certiorari dated 21 May 1991 with Orange County Superior Court, praying the court to "declare that the Special Use Permit is null and void and of no effect; or, if appropriate, . . . [to] remand the Special Use Permit to Respondent's Town Council for action consistent with the Court's findings." The superior court affirmed the decision of the Council

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and dismissed the petition for certiorari. From this order, petitioner appeals to our Court.

In reviewing petitioner's brief presented on this appeal, we note petitioner has failed to meet the requirements of N.C.R. App. P. 28(b). N.C.R. App. P. 28(b) states:

Content of Appellant's Brief. An appellant's brief in any appeal shall contain, under appropriate headings, and in the form prescribed by Rule 28(g) and the Appendixes to these rules, in the following order:

(1) A cover page, followed by a table of contents and table of authorities required by Rule 28(g).

(2) A statement of the questions presented for review.

(3) A concise statement of the procedural history of the case. This shall indicate the nature of the case and summarize the course of proceedings up to the taking of the appeal before the court.

(4) A full and complete statement of the facts. This should be a non-argumentative summary of all material facts underlying the matter in controversy which are necessary to understand all questions presented for review, supported by references to pages in the transcript of proceedings, the record on appeal, or exhibits, as the case may be.

(5) An argument, to contain the contentions of the appellant with respect to each question presented. Each question shall be separately stated. Immediately following each question shall be a reference to the assignments of error pertinent to the question, identified by their numbers and by the pages at which they appear in the printed record on appeal. Assignments of error not set out in the appellant's brief, or in support of which no reason or argument is stated or authority cited, will be taken as abandoned.

The body of the argument shall contain citations of the authorities upon which the appellant relies. Evidence or other proceedings material to the question presented may be narrated or quoted in the body of the argument, with appropriate reference to the record on appeal or the transcript of proceedings, or the exhibits.

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(6) A short conclusion stating the precise relief sought.

(7) Identification of counsel by signature, typed name, office address and telephone number.

(8) The proof of service required by Rule 26(d).

(9) The appendix required by Rule 28(d).

“Only those who properly appeal from the judgment of the trial divisions can get relief in the appellate divisions.” *Sessoms v. Sessoms*, 76 N.C. App. 338, 339, 332 S.E.2d 511, 513 (1985). “The Rules of Appellate Procedure are mandatory and failure to follow the rules subjects an appeal to dismissal.” *Wiseman v. Wiseman*, 68 N.C. App. 252, 255, 314 S.E.2d 566, 567-68 (1984) (citation omitted).

Specifically, petitioner herein has violated N.C.R. App. P. 28(b)(4) and 28(b)(5). Although petitioner presents three questions for review to this Court, petitioner evidently intertwines the statement of the facts, the three questions and all arguments into the body of the brief.

Petitioner has failed to set out a full and complete statement of the facts. This is to be a non-argumentative summary of all material facts underlying the matter in controversy which are necessary to understand all of the questions presented for review, supported by references to pages in the transcript of proceedings, the record on appeal or exhibits. Petitioner has further failed to set out each argument, containing the contentions of petitioner with respect to each question presented. Finally, petitioner has failed to state each question separately, and has failed to follow each question with a reference to the assignments of error pertinent to the question, identified by their numbers and by the pages at which they appear in the printed record on appeal. *Cf., Fine v. Fine*, 103 N.C. App. 642, 406 S.E.2d 631 (1991).

Therefore, this appeal is dismissed.

Judges ORR and MCCRODDEN concur.

COMPUTER SALES INTERNATIONAL v. FORSYTH MEMORIAL HOSPITAL

[112 N.C. App. 633 (1993)]

COMPUTER SALES INTERNATIONAL, INC., PLAINTIFF-APPELLANT v.
FORSYTH MEMORIAL HOSPITAL, INC., DEFENDANT-APPELLEE

No. 9221SC1024

(Filed 16 November 1993)

**Taxation § 25.4 (NCI3d)— property taxes—date of valuation—
valuation and assessment same—liability for taxes under lease
agreement**

Where the parties entered into a computer lease agreement in January 1990 in which defendant agreed to pay taxes "imposed, assessed or payable" during the term of the lease, and the parties entered into an early termination agreement in June 1991 by which defendant specifically agreed that its obligations under the lease would continue until performed in full, defendant was required to pay property taxes for 1991, since N.C.G.S. § 105-285(b) makes it clear that the value of property is determined as of January 1; the act of valuing property is defined as an assessment; applicable taxes were necessarily assessed as of January 1; and it was immaterial that the tax rate and the actual amount of tax were determined after the date the lease was terminated.

Am Jur 2d, State and Local Taxation § 837.

Appeal by plaintiff from judgment entered 24 August 1992 by Judge Peter M. McHugh in Forsyth County Superior Court. Heard in the Court of Appeals 28 September 1993.

Law Offices of Mark C. Kirby, by Howard S. Kohn, for plaintiff.

Wilson & Iseman, by G. Gray Wilson and Elizabeth Horton, for defendant.

LEWIS, Judge.

By this appeal we are asked to interpret the provisions of a computer lease agreement between Computer Sales International, Inc. ("CSI") and Forsyth Memorial Hospital, Inc. ("Forsyth"). The relevant facts are not in dispute. On 17 January 1990, Forsyth leased various items of computer equipment from CSI. The relevant portion of the lease provided:

COMPUTER SALES INTERNATIONAL v. FORSYTH MEMORIAL HOSPITAL

[112 N.C. App. 633 (1993)]

6.1 PAYMENT OF TAXES: Lessee covenants and agrees to pay to the appropriate taxing authority, and discharge before the same become delinquent, all taxes, fees or other charges of any nature whatsoever (together with any related interest or penalties) now or hereafter imposed, assessed or payable ("Impositions") during the term of this Master Lease against Lessor, Lessee or the Equipment by any federal, state, county or local government or taxing authority upon or with respect to [i] the Equipment or any Unit, [ii] upon the leasing, ordering, purchase, sale, ownership, use, operation, return or other disposition thereof, [iii] the Monthly Rental or any other sums due hereunder with respect to any Equipment Schedule, or [iv] the leasing of the Equipment [excepting only federal, state and local taxes measured by the net income of Lessor or any franchise tax upon Lessor measured by Lessor's capital, capital stock or net worth].

Thereafter, in October 1990, CSI wrote to Forsyth regarding the listing of the lease equipment for ad valorem tax purposes. CSI gave Forsyth the option of paying the tax itself or having CSI pay the tax and then reimbursing CSI. Forsyth elected the latter option.

On 26 June 1991 the parties entered into an Early Termination Agreement by which Forsyth specifically agreed that its obligations under the lease would continue until performed in full. After the lease was terminated Forsyth County mailed its tax bills for 1991. CSI paid the \$23,211.65 in property taxes and sent a letter to Forsyth demanding repayment. When Forsyth refused to pay, CSI instituted the present action.

This matter came on for hearing on plaintiff's motion for summary judgment on 13 July 1992. Judge McHugh denied plaintiff's motion and granted summary judgment in favor of defendant. Plaintiff now appeals.

As in all cases of contract interpretation, it is the duty of this Court to ascertain the intention of the parties at the time the contract was executed. In most cases when the intention of the parties is ambiguous the question of what the parties intended is best left for the jury. *Cleland v. Children's Home, Inc.*, 64 N.C. App. 153, 306 S.E.2d 587 (1983). However, in cases where the language used is clear and unambiguous, construction is a matter of law for the court. *Chavis v. Southern Life Ins. Co.*, 76 N.C. App. 481,

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333 S.E.2d 559 (1985), *aff'd*, 318 N.C. 259, 347 S.E.2d 425 (1986). In those cases, the court's only duty is to determine the legal effect of the language used and to enforce the agreement as written. *Colon v. Bailey*, 76 N.C. App. 491, 333 S.E.2d 505 (1985), *reversed on other grounds*, 316 N.C. 190, 340 S.E.2d 478 (1986). It is also well established that the interpretation of a contract is governed by the law of the place where the contract was made. *Tanglewood Land Co. v. Byrd*, 299 N.C. 260, 261 S.E.2d 655 (1980).

We must interpret the language "assessed, imposed or payable" as those terms are used in CSI's lease with Forsyth. The interpretation of these terms is crucial to a resolution of this matter because North Carolina law requires that the value, ownership and place of taxation of personal property be determined as of January 1. N.C.G.S. § 105-285(b) (1992). CSI claims that the taxes were actually imposed and assessed as of January 1 and that it does not matter that Forsyth terminated the lease prior to the date Forsyth County fixed its tax rate and mailed the property tax bills. We agree.

Both parties agree that the taxes were not yet payable because affidavits presented by Forsyth revealed that the tax bills for 1991 had not been sent out when the lease was terminated. Thus, the only question is whether the tax was either imposed or assessed by the time Forsyth terminated the lease.

As stated previously, the law of the place where the contract is made governs its interpretation. In North Carolina the applicable law on personal property taxes is contained in the Machinery Act. N.C.G.S. §§ 105-271 to 105-395.1. No where in the Machinery Act is the term "imposed" defined. However, the term "assessment" is defined by the Machinery Act and we find that this term is sufficiently similar to the verb "assessed" to allow us to resolve this matter. N.C.G.S. § 105-273(3) (1992) defines an assessment as the tax value of property and the process by which the assessment is determined. Similarly, N.C.G.S. § 105-273(18) defines valuation as an appraisal or an assessment. Therefore, since N.C.G.S. § 105-285(b) makes it clear that the value of property is determined as of January 1, and since the act of valuing property is defined as an assessment, we find that the applicable taxes were necessarily assessed as of January 1. It is immaterial that the tax rate and the actual amount of tax were determined after the date the lease was terminated.

STATE v. HARPER

[112 N.C. App. 636 (1993)]

Accordingly, the order of the trial court is reversed and remanded for entry of a judgment in favor of CSI.

Reversed and Remanded.

Judges WELLS and MARTIN concur.

STATE OF NORTH CAROLINA v. DAVID STEVEN HARPER

No. 935SC21

(Filed 16 November 1993)

**Criminal Law § 762 (NCI4th)— reasonable doubt instruction—
moral certainty—honest, substantial misgiving—error**

The trial court's instructions on reasonable doubt amounted to plain error entitling defendant to a new trial where the court used the terms "moral certainty" and "honest, substantial misgiving" in its instructions, since those terms suggested a higher degree of doubt than was required for acquittal under the reasonable doubt standard.

Am Jur 2d, Trial § 832.

Appeal by defendant from judgments entered 11 August 1992 by Judge William C. Griffin in New Hanover County Superior Court. Heard in the Court of Appeals 4 October 1993.

Defendant was convicted of first degree burglary, first degree rape and first degree sex offense. The jury found defendant guilty of all charges, and he was sentenced to two consecutive life sentences plus fifty years for the burglary conviction.

The State's evidence showed the following. The victim testified that in the early morning hours of 2 August 1991 she and her two year old son were in bed together asleep. She woke up at approximately 1:30 or 2:00 a.m. because someone was on top of her. When the victim tried to push the person off, he began beating her in the head. She yelled for help and was told to shut up. The person asked if she had any money, and when she responded that she had only three or four dollars, he began beating her in

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[112 N.C. App. 636 (1993)]

the head again. He then took off her underwear and performed oral sex on her and forced her to perform oral sex on him.

The victim's son woke up and started crying. The assailant hit the victim again and told her to make her son be quiet or he would kill her. She asked him if she could fix a bottle so that her son would go back to sleep. The assailant held her arms behind her, and she felt a cold object against her head. He told her if she screamed or anything "I will blow your head off."

After fixing her son's bottle, the victim laid on the couch with him. The assailant came up behind her and hit her in the head again. She turned as he threatened her again and saw his face. Hitting her again, he told her to turn around or he would kill her.

Her son was still crying, so the victim took him back to his room and laid on the floor with him. The assailant performed oral sex on her for a second time and had intercourse with her. Then he put a sheet over her and her son and told her not to move. After a few minutes had passed, she got up and drove to the hospital. She received stitches in several places on her head and was given one or two shots. She stayed in the emergency room for approximately four hours.

Attorney General Michael F. Easley, by Assistant Attorney General D. David Steinbock, for the State.

Nora Henry Hargrove for defendant-appellant.

ARNOLD, Chief Judge.

Defendant's first assignment of error is that the trial court erred in its instructions on reasonable doubt. The trial court's instructions on reasonable doubt were as follows:

A reasonable doubt is not a vain, imaginary or fanciful doubt. It is a sane, rational doubt arising out of the evidence or the lack of evidence or from the deficiency of the evidence, as the case may be.

When it is said that the jury must be satisfied of the defendant's guilt beyond a reasonable doubt, it is meant that they must be fully satisfied or entirely convinced or satisfied to a *moral certainty* of the truth of the charge.

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[112 N.C. App. 636 (1993)]

If after considering, comparing and weighing all of the evidence the minds of the jurors are left in such a condition that they cannot say that they have an abiding faith to a *moral certainty* in the defendant's guilt, then they have a reasonable doubt. Otherwise not.

A reasonable doubt, as that term is employed in the administration of criminal law, is an *honest, substantial misgiving* generated by an insufficiency of proof, an insufficiency which fails to convince your judgment and conscience and satisfy your reasoning as to the guilt of the accused.

It is not a doubt suggested by the ingenuity of lawyers or by the jury's own ingenuity which is not legitimately warranted by the testimony. It is not a doubt born of merciful inclination or disposition to permit the defendant to escape the penalty of the law or prompted by sympathy for a defendant or those who may be connected with him.

(Emphasis added.) Defendant equates the trial court's instruction on reasonable doubt to the instruction given in *State v. Montgomery*, in which the majority held that the trial court's reasonable doubt instruction violated the requirements of the Due Process Clause as interpreted by the United States Supreme Court in *Cage v. Louisiana*, 498 U.S. 39, 112 L.Ed.2d 339 (1990) (per curiam). *State v. Montgomery*, 331 N.C. 559, 417 S.E.2d 742 (1992). The trial court in *Montgomery* used the terms "substantial misgiving" and "moral certainty" in combination with its reasonable doubt instruction, thereby suggesting a higher degree of doubt than is required for acquittal under the reasonable doubt standard. *Id.* Although the defendant in *Montgomery* failed to object to the instruction, the Court nevertheless held that the issue was properly preserved for appellate review because defendant's written request for the pattern jury instruction on reasonable doubt, N.C.P.I.—Crim. 101.10 (1974), met the requirements of Appellate Rule 10(b)(2). *Id.*

This issue has since been addressed again by our Supreme Court in *State v. Bryant*, 334 N.C. 333, 432 S.E.2d 291 (1993). Recognizing that only two Justices in the majority reached the issue of the constitutionality of the reasonable doubt instruction, the Court did not consider *Montgomery* to be binding precedent. *Id.* The Court nevertheless held that the trial court's instruction, which was essentially identical to the reasonable doubt instruction in *Montgomery*, violated *Cage*. *Id.* Like defendant in the case at

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[112 N.C. App. 636 (1993)]

bar, however, the defendant in *Bryant* failed to object to the instruction at trial; therefore, the State argued that the alleged infirmity in the instruction must be addressed in terms of "plain error." *Id.* at 339, 432 S.E.2d at 295. The plain error rule as set forth in *State v. Odom*, 307 N.C. 655, 300 S.E.2d 375 (1983) states:

[T]he plain error rule . . . is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is a "*fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done," or "where [the error] is grave error which amounts to a denial of a fundamental right of the accused," or the error has "resulted in a miscarriage of justice or in the denial to appellant of a fair trial" or where the error is such as to "seriously affect the fairness, integrity or public reputation of judicial proceedings" or where it can be fairly said "the instructional mistake had a probable impact on the jury's finding that the defendant was guilty."

Id. at 660, 300 S.E.2d at 378 (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir. 1982) (footnotes omitted) (emphasis in original)). In light of the plain error analysis with regard to the reasonable doubt instruction at issue, the Court stated that "*Cage* error is fundamental error. A jury verdict rendered in violation of *Cage* is not a jury verdict within the meaning of the Sixth Amendment. *Sullivan v. Louisiana*, --- U.S. at ---, 124 L.Ed.2d at 188. Clearly, convicting a person of first-degree murder in violation of *Cage* meets the test of plain error." *Bryant*, 334 N.C. at 340, 432 S.E.2d at 295. The defendant therefore was entitled to a new trial based on the *Cage* error. *See also, State v. Williams*, 334 N.C. 440, 434 S.E.2d 588 (1993) (citing *Bryant* with approval).

The reasonable doubt instruction stated above is virtually identical to the instructions given in *Bryant*, *Montgomery* and *Cage*. And even though defendant failed to object to the instruction, we are bound by these cases and must say, according to our Supreme Court, that there is plain error, and defendant is entitled to a new trial.

New Trial.

Judges WYNN and JOHN concur.

STATE v. WHITTED

[112 N.C. App. 640 (1993)]

STATE OF NORTH CAROLINA v. WAYNE OSCAR WHITTED, JR., DEFENDANT

No. 9212SC1237

(Filed 16 November 1993)

Searches and Seizures § 26 (NCI4th)— stop of vehicle—probable cause to search defendant—sufficiency of evidence

An officer had probable cause to search defendant where the officer knew that the car in which defendant was a passenger fled at high speed from in front of a residence known for drug trafficking; the officer knew drug transactions were frequently made at curbside in this neighborhood; after the stop defendant acted suspiciously by pushing something into his pocket and refusing to remove his hand after the officer asked him to do so; during the pat down for weapons, the officer felt a pebble in defendant's pocket; and based upon the surrounding circumstances, his experience, and his knowledge that the most common type of drug sold in that neighborhood was crack rather than powder cocaine, the officer believed that the pebble was crack cocaine.

Am Jur 2d, Searches and Seizures § 70.

Law enforcement officer's authority, under Federal Constitution's Fourth Amendment, to stop and briefly detain, and to conduct limited protective search of or "frisk," for investigative purposes, person suspected of criminal activity—Supreme Court cases. 104 L. Ed. 2d 1046.

Appeal by defendant from judgment entered 20 August 1992 by Judge B. Craig Ellis in Cumberland County Superior Court. Heard in the Court of Appeals 27 September 1993.

On 31 May 1991, members of the Fayetteville Police Department's Emergency Response Team (ERT) were notified by radio that another ERT member was about to stop a car which had been parked in front of a residence and fled at a high rate of speed after the driver spotted a marked ERT patrol car. Defendant was a passenger in this car. The area from which defendant fled was known for frequent drug sales, especially of crack cocaine. People commonly pulled over to the curbside, after being flagged down, and purchased drugs. This particular area had been under surveillance for thirty days prior to this stop, and several arrests

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had been made based on drug transactions at the residence from which defendant fled. On the night defendant was stopped, the ERT officers noticed activity at the residence which indicated to them that drugs were being sold.

Two ERT patrol cars were on hand when defendant and the driver of the fleeing car were stopped. Officers went to each side of the car to investigate. Defendant was sitting in the front passenger seat. The officer on defendant's side noticed that defendant kept his hand by his front pants pocket and "kept pushing something down." Defendant did not move his hand when the officer asked him to do so, and this prompted the officer to pat down defendant for weapons. During the pat down, the officer felt a hard substance in defendant's pocket which he believed, based on his experience and knowledge of the circumstances, was crack cocaine. He removed the substance and discovered that it was crack cocaine.

Defendant was charged with felonious possession of a controlled substance and pleaded guilty after the trial judge denied his motion to suppress the cocaine. The trial judge sentenced defendant to a five year prison term. From this judgment defendant appeals.

Attorney General Michael F. Easley, by Special Deputy Attorney General Thomas D. Zweigart, for the State.

Larry J. McGlothlin for defendant appellant.

ARNOLD, Chief Judge.

Defendant apparently concedes that stopping the vehicle and patting down defendant for weapons was constitutionally permissible. He argues that the issue is whether or not feeling the pebble in defendant's pocket, combined with all the surrounding circumstances, gave the officer probable cause to search defendant. We believe probable cause existed.

The officer knew that the car in which defendant was a passenger fled at high speed from in front of a residence known for drug trafficking. In fact, several arrests recently had been made at this residence. The officer also knew that drug transactions were frequently made at curbside in this neighborhood. After the stop, defendant acted suspiciously by pushing something into his pocket and refusing to remove his hand after the officer asked him to do so. During the pat down for weapons, the officer felt

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a pebble in defendant's pocket. Based upon the surrounding circumstances, his experience, and his knowledge that the most common type of drug sold in that neighborhood was crack rather than powder cocaine, the officer believed that the pebble was crack cocaine.

Suspicious behavior and flight from officers are obvious factors which support a finding of probable cause to arrest or to search. *State v. Mills*, 104 N.C. App. 724, 729-30, 411 S.E.2d 193, 196 (1991). The nature of the area in which the arrest was made and the number of drug related arrests in that area may also be considered in the totality of the circumstances. *Id.* The circumstances in this case gave rise to probable cause to search defendant after the officer felt the pebble in defendant's pocket.

The trial judge's findings of fact were supported by evidence in the record, and his conclusions were properly drawn from those findings. The order denying defendant's motion to suppress is affirmed.

Affirmed.

Judges WYNN and JOHN concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 16 NOVEMBER 1993

ASBURY v. SARA LEE CORP. No. 9210IC1181	Ind. Comm. (900271)	Affirmed in part & remanded for further proceedings
BAKER v. BAKER No. 9210DC607	Wake (87CVD9105)	Vacated & Remanded
COOK v. LOPEZ No. 9327SC274	Gaston (92CVS3248)	Vacated & Remanded
FARTHING v. COUNCIL No. 9214SC438	Durham (89CVS849)	Affirmed in part & remanded in part
FIRST CITIZENS BANK & TRUST CO. v. McLAMB No. 9211SC762	Johnston (91CVS1771)	Affirmed
HIGHLAND v. HIGHLAND No. 924DC1046	Onslow (92CVD398)	Affirmed
IN RE EMPIRE POWER CO. v. DUKE POWER CO. No. 9210UC917	Util. Comm. E-7 Sub 492	Affirmed
SHEEGOG v. MONAHAN No. 934SC353	Onslow (90CVS324)	Affirmed
STATE v. BARNES No. 937SC170	Wilson (91CRS12591)	No Error
STATE v. BELK No. 9226SC1094	Mecklenburg (91CRS21866) (91CRS21867) (91CRS27307)	As to 91CRS27307 & 91CRS21866— no error; As to 91CRS21867—new trial
STATE v. BENNETT No. 931SC152	Gates (92CRS188) (92CRS189) (92CRS190) (92CRS191) (92CRS192)	No Error
STATE v. CLARK No. 9325SC394	Catawba (90CRS17802)	Affirmed
STATE v. HAMBY No. 9324SC351	Avery (92CRS2291) (92CRS2292)	No Error

STATE v. HAYES No. 9315SC341	Alamance (92CRS02007) (92CRS08091)	No Error
STATE v. HILTON No. 9226SC1070	Mecklenburg (89CRS081521) (89CRS081523)	No Error
STATE v. JOHNSON No. 9314SC462	Durham (91CRS6130)	No Error
STATE v. JONES No. 9318SC12	Guilford (91CRS54213) (91CRS54214) (91CRS54215)	No Error
STATE v. MODLIN No. 932SC381	Beaufort (92CRS1471)	No Error
STATE v. PAYTON No. 9328SC354	Buncombe (91CRS61883) (91CRS61884)	No Error
STATE v. PEDERSEN No. 935SC368	New Hanover (92CRS7755)	No Error
STATE v. RAMSEY No. 9226SC1097	Mecklenburg (91CRS36794)	No Error
STATE v. WHITE No. 9225SC700	Catawba (91CRS15280)	No error in guilt or innocence phase of trial; vacated for resentencing
WHITAKER v. HALIFAX COUNTY BD. OF EDUC. No. 936SC31	Halifax (92CVS120)	Affirmed
WHITECO INDUSTRIES, INC. v. HARRELSON No. 9210SC1212	Wake (90CVS00754)	Affirmed
WOODLAKE COUNTRY CLUB PROPERTY OWNERS ASSN. v. TRAMPUS No. 9220DC1184	Moore (91CVD475)	Affirmed
WOOTEN v. MATTHEWS No. 9223DC1104	Yadkin (91CVD156)	Reversed & Remanded

FIRST CITIZENS BANK & TRUST CO. v. McLAMB

[112 N.C. App. 645 (1993)]

FIRST CITIZENS BANK & TRUST COMPANY, PLAINTIFF v. PHILLIP C. McLAMB, KATHY S. McLAMB, JAMES B. RIVENBARK, ELAINE N. RIVENBARK, HAROLD E. BRYANT, DONNA G. BRYANT, BENJAMIN F. CLIFTON, JR., AND KATHERINE CLIFTON, DEFENDANTS

No. 9211SC762

(Filed 16 November 1993)

1. Guaranty § 17 (NCI4th)— guaranty agreement—extension of notes—no discharge

A material alteration of a contract between a principal debtor and creditor without a guarantor's consent will discharge the guarantor. There was no genuine issue of fact here as to the discharge of defendant-guarantors by the extension of notes where the guaranty agreement and the notes provided that such modifications will not discharge defendants from liability.

Am Jur 2d, Guaranty §§ 79-96.

2. Principal and Surety § 3 (NCI4th)— gratuitous sureties—duty of creditor to notify guarantors

The argument of defendant-guarantors in an action on notes that the bank had a duty to notify them that the purported extended continuing guaranty agreements were in fact surety contracts was meritless because nothing in the record reveals that the bank was aware that the contract was anything other than a continuing guaranty agreement. The record does not show that the bank was attempting to deceive or mislead defendants.

Am Jur 2d, Suretyship §§ 24-30.

3. Pleadings § 289 (NCI4th)— counterclaim—set forth in affidavit—not proper form

The trial court was not at liberty to consider a counterclaim set forth in an affidavit. Counterclaims are required to be set forth in pleadings. N.C.G.S. § 1A-1, Rule 13.

Am Jur 2d, Counterclaim, Recoupment, and Setoff §§ 141-143.

FIRST CITIZENS BANK & TRUST CO. v. McLAMB

[112 N.C. App. 645 (1993)]

Appeal by defendants from judgment entered 29 April 1992 by Judge Robert L. Farmer in Johnston County Superior Court. Heard in the Court of Appeals 10 June 1993.

STATEMENT OF THE FACTS

On 13 March 1990, Johnston County Motorcars, Inc., d/b/a Smithfield Ford-Lincoln-Mercury (Smithfield F-L-M) executed a note in favor of plaintiff First Citizens Bank & Trust. The note was due and payable in full on 1 May 1990 and was secured by collateral of all inventory of parts now owned or hereinafter acquired, tangible and intangible property, equipment, furniture, fixtures and all outside lights, and all receivables including those from Ford Motor Company. On 20 August 1990, Smithfield F-L-M executed a note modification agreement with plaintiff for the 13 March 1990 note in the amount of \$67,500.00. The note modification agreement stated that the note and said amount would be due and payable in full on 19 October 1990. Smithfield F-L-M executed an additional note modification agreement with plaintiff for the 13 March 1990 note in the amount of \$67,500.00. Said note modification agreement stated that the balance due on the 13 March 1990 note as of said date was \$61,050.67 and that the note was due and payable in 35 monthly installments of \$2,035.13 beginning on 1 January 1991 with the balance of principal and interest to be due on 1 December 1993.

On 13 March 1990, defendants Phillip C. McLamb and Kathy S. McLamb executed an Unconditional Continuing Guaranty Agreement in favor of plaintiff in connection with the note of Smithfield F-L-M dated 13 March 1990. On 13 March 1990, defendants James B. Rivenbark and Elaine N. Rivenbark executed an Unconditional Continuing Guaranty Agreement in favor of plaintiff in connection with the note of Smithfield F-L-M dated 13 March 1990.

Smithfield F-L-M subsequently defaulted on the \$67,500.00 note. Thereafter, plaintiff demanded payment from defendants McLamb and Rivenbarks pursuant to the terms of the \$67,500.00 note and the aforementioned Unconditional Continuing Guaranties. Defendants refused to pay the indebtedness.

Bad Checks

On 8 May 1991, Smithfield F-L-M made two payments to plaintiff, the first in the amount of \$3,397.05 and the second in the amount of \$3,749.97. The payments were in the form of checks

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and were returned marked "insufficient funds." Pursuant to the aforementioned Unconditional Continuing Guaranties executed by defendants, Phillip C. McLamb, Kathy S. McLamb, James B. Rivenbark and Elaine N. Rivenbark on 13 March 1990, where the defendants agreed to guarantee payment of all liabilities and obligations, demand was made for payment of the two checks. Defendants refused to pay the indebtedness.

The \$150,000.00 Note

On 15 November 1989, defendants Phillip C. McLamb and Kathy S. McLamb executed a note in the amount of \$150,000.00 in favor of plaintiff. The note was due and payable in 11 monthly installments of \$4,946.12 with the first payment being due and payable on 15 December 1989 and the last payment of all principal and interest due to be made on 15 November 1990. On 20 November 1990, defendants Phillip C. McLamb and Kathy S. McLamb executed a note modification agreement in favor of plaintiff on the aforementioned 15 November 1989 note in the amount of \$150,000.00. The balance due on the \$150,000.00 note dated 15 November 1989 was \$117,928.40 as of 20 November 1990 and was to be paid in 35 monthly installments of \$3,931.14, the first payment being due and payable on 1 January 1991 with a final payment of all principal and interest due on 1 December 1993.

On 15 November 1989, defendants James B. Rivenbark and Elaine N. Rivenbark executed an Unconditional Continuing Guaranty Agreement in favor of plaintiff for the 15 November 1989 note executed by defendants Phillip C. McLamb and Kathy S. McLamb in the amount of \$150,000.00. Defendants McLambs and Rivenbarks defaulted on their obligation due and owing plaintiff pursuant to the terms of the \$150,000.00 note and Unconditional Continuing Guaranty. Plaintiff made a demand upon defendants who refused to pay the indebtedness.

The \$174,054.44 Note

On 1 May 1990, defendants McLambs, defendants Rivenbarks and defendants Benjamin F. Clifton, Jr. and Katherine Clifton executed and delivered to plaintiff a note in the amount of \$174,054.44. The aforementioned defendants defaulted on their obligation due and owing plaintiff pursuant to the terms of the \$174,054.44 note. Plaintiff made a demand for sums due and owing. Defendants again refused to pay the indebtedness.

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Litigation

On 9 October 1992, plaintiff filed its complaint against defendants Phillip C. McLamb, Kathy S. McLamb, James B. Rivenbark, Elaine N. Rivenbark, Harold E. Bryant, Donna G. Bryant, Benjamin F. Clifton, Jr. and Katherine Clifton, who as guarantors and makers of various notes due and owing plaintiff, were in default of their obligations.

On 3 March 1992, defendants Phillip C. McLamb, Kathy S. McLamb, James B. Rivenbark and Elaine N. Rivenbark answered and filed motions to dismiss in this action. On 19 March 1992, plaintiff filed a notice of hearing indicating that it wished to hear the defendants' motions to dismiss. On 20 March 1992, plaintiff filed an affidavit in support of a motion. On 25 March 1992, plaintiff filed a motion for partial summary judgment. On 24 April 1992, defendant James B. Rivenbark filed an affidavit in support of the various motions to dismiss filed by defendants and in response to plaintiff's motion for summary judgment.

On 27 April 1992, this matter came on to be heard by Judge Farmer who granted plaintiff's motion for partial summary judgment. The trial court also held the defendants' motions to dismiss were moot by its judgment which granted plaintiff's partial summary judgment motion. Defendants McLamb and Rivenbark filed notice of appeal with this Court.

Ward and Smith, P.A., by Michael P. Flanagan and Louise W. Flanagan, for plaintiff-appellee.

Battle, Winslow, Scott & Wiley, by Joseph N. Calloway, for defendants-appellants.

JOHNSON, Judge.

Summary judgment must not be granted if there exists a genuine issue of material fact. North Carolina General Statutes § 1A-1, Rule 56(c) (1990). Defendants' contend that the issues of material fact are (1) whether the agreement was actually a surety contract or a guaranty agreement and (2) whether the contract was materially altered so as to release them from their obligation. Plaintiff contends that these issues of fact are not material since the terms of the agreement signed by defendants allow plaintiff to enter into note modifications, such as an extension of time, with the defendants' full assent.

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[112 N.C. App. 645 (1993)]

[1] Although defendants correctly argue that North Carolina law states that as a general rule, material alterations of a contract between a principal and a creditor will operate to discharge a surety, *Fleming v. Bordon*, 127 N.C. 214, 37 S.E. 219 (1900), we also find that a material alteration of a contract between a principal debtor and creditor without a guarantor's consent will discharge the guarantor from its obligation. North Carolina General Statutes § 25-3-606 (1987). Therefore, the dispositive issue is not whether the contract is a surety contract or a guaranty agreement but whether there was a material alteration so as to discharge defendants from their obligation. Labels are not necessarily binding. It is the substance of the transaction that controls. *Gillespie v. DeWitt*, 53 N.C. App. 252, 258, 280 S.E.2d 736, 741, *cert. denied*, 304 N.C. 390, 285 S.E.2d 832 (1981). In the instant case, the agreement and the notes by their terms guaranteed the debts of Smithfield F-L-M to plaintiff. The Unconditional Continuing Guaranty Agreement provides that the signatory has consented to, among other things, that plaintiff:

[M]ay at any time, or from time to time, in its sole discretion; (i) extend or exchange the time of payment, and/or any manner, place or terms of payment of any or all of the 'Obligations of Borrower'; . . . and in such manner and upon such terms as BANK may deem proper and/or desirable, and without notice to further assent from GUARANTOR, it being agreed that GUARANTOR shall be and remain bound upon this Unconditional Guaranty . . . notwithstanding any such change, exchange, settlement, compromise, surrender, release, sale or other disposition, application, renewal or extension[.]

Contained within the terms of both the \$67,500.00 note and \$150,000.00 note are provisions which clearly constitute waiver of any extension of time for payment, or notice thereof:

All parties to this note, whether maker, guarantor, surety, or endorser, hereby waive presentment for payment, demand, protest, notice of protest, nonpayment, and dishonor, agree that any extension of time for the payment of this note shall not affect the liability of such parties, and hereby waive all notice of such extension[.]

The agreement as stated allows for extensions of time and other modifications, but provides that such modifications will not discharge defendants from liability for any debts guaranteed. "Where the

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language of a contract is plain and unambiguous, construction of the agreement is a matter of law; and the court may not ignore or delete any of its provisions, nor insert words into it, but must construe the contract as written, in light of the undisputed evidence as to the custom, usage and meaning of its terms." *Martin v. Martin*, 26 N.C. App. 506, 508, 216 S.E.2d 456, 457-58 (1975). Where the language of a contract of guaranty, or one of suretyship, provides that the signatory has made him or herself liable for all renewals, extensions and modifications and a renewal, extension or modification occurs, the signatory is bound by the terms of the agreement and will not be discharged from his or her liability. *Love v. Bache & Co.*, 40 N.C. App. 617, 253 S.E.2d 351 (1979); *Trust Co. v. Creasy*, 301 N.C. 44, 269 S.E.2d 117 (1980).

By executing the agreement, defendants clearly waived any defense of discharge due to the extension of the notes. We agree with the trial court that there was no genuine issue of fact.

[2] We also note defendants' argument that the bank had a duty to notify the guarantors that the purported extended continuing guaranty agreements were in fact surety contracts and that the words were not binding without ratification because these were surety contracts and defendants were gratuitous sureties.

A surety is in general a friend of the principal debtor, acting at his request, and not at the request of the creditor; and, in ordinary cases, it may be assumed that the surety obtains from the principal all of the information which he requires. This is the applicable rule unless there is some fact, which the creditor knows the surety probably will not discover, of such vital importance to the risk that the creditor must have been aware that the non-disclosure would in effect amount to a contrary representation to the surety. *Construction Co. v. Crain and Denbo, Inc.*, 256 N.C. 110, 123 S.E.2d 590 (1962).

Nothing in the record reveals the bank was aware that the contract was anything other than an Unconditional Continuing Guaranty Agreement. The record does not show that the bank was attempting to deceive or misled defendants when defendants signed the Unconditional Continuing Guaranty Agreement. As such, we find defendants' argument meritless.

[3] Lastly, defendants argue that the court failed to consider James B. Rivenbark's counterclaim that was set out in his affidavit. North

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[112 N.C. App. 651 (1993)]

Carolina Rules of Civil Procedure require that a counterclaim shall be set forth in a pleading. N.C.R. Civ. P. 13. As an affidavit is not a pleading, the court was not at liberty to consider a counterclaim that was not in its proper procedural form. N.C.R. Civ. P. 7.

We affirm the decision of the trial court.

Judges GREENE and WYNN concur.

STATE OF NORTH CAROLINA v. ERIC FUTRELL, DEFENDANT

No. 9210SC286

(Filed 7 December 1993)

1. Evidence and Witnesses § 1874 (NCI4th) — rape — fingerprints on window screen — time of impression — no evidence that time of crime exclusive — admissible

The trial court did not err in a prosecution for second-degree rape and assault on a female by admitting evidence that a crime scene specialist processed a window screen at the scene of the crime and found three latent prints and that these were compared with those of defendant by a fingerprint identification expert who determined that two matched. Although defendant contended that the State failed to present substantial evidence of circumstances from which a jury could find that defendant's fingerprints were impressed on the window screen at the time the crime was committed, whether fingerprints could have been impressed only at the time of a particular crime is ordinarily a question of fact to be determined by the jury, not a question of law to be determined by the court prior to admission of the fingerprint evidence. When a properly qualified fingerprint expert offers evidence that prints found at a crime scene are those of the individual charged with the offense, the expert's testimony is relevant to show the accused was present at the scene on some occasion.

Am Jur 2d, Evidence § 375.

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[112 N.C. App. 651 (1993)]

2. Evidence and Witnesses § 2211 (NCI4th)— rape—DNA analysis—matching sample—conflicting expert testimony—State's evidence admissible

The trial court did not err in a prosecution for second-degree rape and assault on a female by admitting evidence of DNA profile testing. While the expert testimony presented at defendant's trial was conflicting in that defendant offered evidence to impeach the particular procedures used in a specific test and the reliability of the results obtained, the resultant crucial issue was one of credibility of the experts and it was for the jury to determine what weight each expert's testimony should have received. The trial court properly instructed the members of the jury that they were the sole judges of the credibility of each witness and of the weight to be given the testimony of each witness, that they might believe all or any part or none of the testimony of each witness, and that they were not to accept an expert witness's opinion to the exclusion of the facts and circumstances disclosed by other testimony.

Am Jur 2d, Expert and Opinion Evidence § 300.**3. Appeal and Error § 147 (NCI4th)— rape—DNA testing—issue not preserved for appeal**

A defendant could not assign as error the introduction of DNA evidence in a rape trial where, upon motions by defendant *in limine* for a pretrial hearing on DNA evidence and to suppress DNA evidence, the court conducted a *voir dire* hearing at which only Dr. Adams of the F.B.I. testified, defendant offered no evidence at the hearing and specifically no testimony from either of his expert witnesses, and, in arguing the motions, defendant's trial counsel advised he had decided to "reserve . . . to the jury" the issue of reliability of the F.B.I.'s DNA testing while asserting that the evidence was inadmissible upon other grounds. Moreover, there is a presumption that the court's evidentiary rulings are proper; defendant bears the burden of demonstrating that a particular ruling was incorrect and failed to meet this burden.

Am Jur 2d, Appeal and Error §§ 545 et seq.

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[112 N.C. App. 651 (1993)]

4. Evidence and Witnesses § 650 (NCI4th) — rape — DNA testing — motion to suppress denied — findings not made — not required

Findings of fact were not required to support the trial court's denial of defendant's motions to suppress DNA evidence in a rape trial where defendant presented no evidence at the *voir dire* hearing and the testimony of the State's witness did not support defendant's contention regarding the unreliability of F.B.I. methodology. Where evidence is uncontroverted and the facts not in dispute, a trial court is not *required* to make findings of fact, even when provided for by statute or case law. Additionally, the court indicated to counsel at the end of the trial that he would cooperate if there were matters needing attention at a later date, leaving his home telephone number with the court clerk, so that defendant's counsel had an opportunity to reiterate his request for findings. Finally, defendant prepared the record for appeal and could have sought to have the findings included therein.

Am Jur 2d, Motions, Orders and Rules § 26.**5. Constitutional Law § 349 (NCI4th); Evidence and Witnesses § 2170 (NCI4th) — rape — DNA testing — results not presented by technician performing tests — admissible**

A rape and assault defendant's Sixth Amendment right to confront witnesses against him was not violated by the admission into evidence of DNA profile test results where the lab technician who actually performed the tests did not testify at trial. The expert witness who presented the results supervised the testing procedure upon which his opinions were based, was present for cross-examination and was questioned vigorously and thoroughly, the record reflects that the technician's notes and photographs were available to defendant's counsel, and defendant at no time attempted to subpoena the laboratory technician nor sought the assistance of the court in securing her presence for trial. An expert need not base his opinion upon personal knowledge as long as the basis for his or her opinion is available in the record or available upon demand. N.C.G.S. § 8C-1, Rule 703.

Am Jur 2d, Expert and Opinion Evidence §§ 75 et seq.

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[112 N.C. App. 651 (1993)]

6. Rape and Allied Sexual Offenses § 98 (NCI4th)— second-degree rape and assault on a female—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss charges of second-degree rape and assault on a female based on insufficient evidence where the State's DNA evidence was admissible; while defendant claims the State failed to make a showing that his fingerprints could only have been impressed on the victim's window frame at the time of the offense, defendant's argument is misplaced because the fingerprint evidence at defendant's trial did not stand alone, nor was it necessarily the primary component of the State's case; and the victim's admitted inability to detail her assailant's physical characteristics with accuracy or certainty is a circumstance for the jury to consider when evaluating her testimony. Moreover, defendant introduced evidence after making the motion to dismiss and did not make a motion to dismiss at the true close of all the evidence. N.C.R. App. P. 10(b)(3).

Am Jur 2d, Rape §§ 88 et seq.**7. Criminal Law § 1158 (NCI4th)— rape—sentencing—aggravating factors—use of deadly weapon—armed with deadly weapon—improper**

The trial court erred when sentencing defendant for second-degree rape by finding in aggravation that defendant was armed with a deadly weapon at the time of the crime and that defendant used a deadly weapon where both findings were supported by evidence that defendant possessed a knife at the victim's apartment. Defendant's use of a deadly weapon presupposes he was armed with it and the court erroneously used the same evidence to prove two distinct factors.

Am Jur 2d, Criminal Law §§ 598, 599.

Appeal by defendant from judgment entered 22 November 1991 by Judge Knox V. Jenkins, Jr. in Wake County Superior Court. Heard in the Court of Appeals 31 March 1993.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Valerie B. Spalding, for the State.

John T. Hall for defendant-appellant.

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JOHN, Judge.

Defendant appeals his conviction and sentence on one count of second degree rape and one count of assault on a female. He asserts the trial court erred by: 1) admitting certain fingerprint and DNA evidence; 2) denying his motion to dismiss at the close of all the evidence; and 3) finding duplicitous aggravating factors. We agree in part and remand the charge of second degree rape for resentencing.

At trial, the State's evidence included the following: During the early morning hours of 16 June 1989, Elizabeth D. (the victim), a nineteen year old student sharing an apartment with two female roommates, was awakened by a kiss on her cheek from a male she did not recognize. She felt what she believed to be a knife at her neck, and was told: "[s]hut up, face the wall or I'll kill you." When she turned away from the assailant, he inserted his finger into her vagina and told her to take off her underwear, repeatedly threatening to kill her if she fought with him or failed to comply. After she removed her underwear, the man forced himself between her legs and, still holding the knife in his left hand, had intercourse with her against her will. To stifle her cries, the victim held blankets and a stuffed animal to her face. She estimated the encounter lasted five to ten minutes. Afterwards, the assailant asked if she had any money, but left without taking the \$2.00 she offered. The victim looked at her bedside digital clock, which indicated it was 5:43 a.m. She awakened her roommates, telephoned her father, and thereafter contacted the police. An officer drove the victim to the hospital, where a rape kit procedure was performed and a blood sample taken.

A crime scene specialist processed for fingerprints the living room window of the victim's apartment as well as a screen which had been removed, the window having been determined to be the attacker's point of entry. No fingerprints were found on the window glass, but three latent fingerprints were discovered on the screen. Defendant was later fingerprinted, and, upon inquiry at that time, responded there was no reason his fingerprints should be anywhere in or around the victim's apartment. An expert in fingerprint identification, after comparing the latent fingerprints found on the screen with those of defendant, determined two matched.

Several witnesses placed defendant in close proximity to the victim's apartment at or about the time of the assault.

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An expert in forensic serology testified blood samples revealed the victim and defendant each were "ABO Type A secretors" in blood classification. A slide of a stain taken from the victim's panties indicated the presence of spermatozoa.

Special Agent Dwight Adams, Ph.D. (Dr. Adams), assigned to the DNA Analysis Unit of the F.B.I. Laboratory in Washington, D.C., testified as an expert in forensic DNA analysis. He explained in detail the F.B.I. procedure in testing and analyzing DNA samples, as well as quality controls in place at the F.B.I. Laboratory. Using vaginal swabs from the victim, a cutting from her panties, and blood samples from both the victim and defendant, he examined four "autorads," each representing a different genetic locus. In all four, he concluded DNA from semen found on the victim's panties matched DNA from defendant's blood sample. Therefore, defendant could not be eliminated as a possible source of the semen. Dr. Adams then compared DNA from defendant's blood sample and the semen to the F.B.I.'s black population data base and concluded the probability of finding a random match of the DNA in the semen and in defendant's blood was approximately 1 in 2.7 million individuals.

Pertinent portions of defendant's evidence indicated the following: Dr. Moses Schanfield (Dr. Schanfield), an expert in DNA analysis, was critical of the F.B.I. statistical methodology, stating it was hard to derive and justify mathematically. According to Dr. Schanfield, weaknesses in the F.B.I. procedure lead to distortions in results, particularly because of the small size and unknown details of the data base it utilizes. He also explained the principle of Hardy-Weinberg equilibrium and the use of the product rule in calculating the probability of a coincidental match in DNA material.

On cross-examination, Dr. Schanfield acknowledged he recalculated the frequency statistics on the matches demonstrated by the four F.B.I. "autorads," ultimately determining nothing excluded defendant as a possible donor of the semen found on the victim's underwear. However, his calculation determined the chance of finding another black male in the population with the same four profiles to be 1 in 237,000.

Dr. Ted Emigh (Dr. Emigh), associate faculty member in the Department of Genetics at North Carolina State University, testified as an expert in statistics and population genetics on defendant's behalf. Based on the statistical theory involved in quantifying the

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product rule used by the F.B.I. once its laboratory has declared a "match" of DNA fragments, the data base used by the F.B.I. in defendant's case was not, in Dr. Emigh's opinion, random but rather "haphazard" because the sample size was too small. To calculate accurate probability when an individual is from a particular location, he stated, it is necessary to collect blood samples representative of that community for the data base—as opposed to samples from the "whole population." With a 300-person data base, for example, he contended it was impermissible to use the product rule in statistical calculations, and that a sample size of several thousand would be needed for valid computations. He further alleged the F.B.I. had neither demonstrated the lack of substructuring nor satisfactorily and scientifically established the existence of Hardy-Weinberg equilibrium in their data base.

Defendant testified on his own behalf and, in detailing his activities on the morning in question, denied raping the victim and stated he did not touch the living room window or its screen on 16 June 1989. Through his testimony and that of other witnesses, defendant presented evidence tending to show alibi and an earlier occasion on which he might have handled the window screen.

In rebuttal by the prosecution, Dr. Bruce Weir (Dr. Weir), professor of statistics and genetics at North Carolina State University, testified as an expert in statistics and population genetics. Having previously done consulting work with the F.B.I. and with access to its data base, he estimated the frequency of defendant's DNA profile in the U.S. black population to be 1 in 2.8 million. While acknowledging the F.B.I. data base is small, Dr. Weir explained he included in his calculation a statistical mechanism to accommodate that fact. He stated the method by which the F.B.I. gathered and applied its data base to defendant's case "is certainly accepted by the people who have had opportunity to examine the data."

I.

[1] Defendant first contends the trial court erred by denying his motion to suppress and overruling his objections to fingerprint evidence. He argues the State failed to present substantial evidence of circumstances from which a jury could find defendant's fingerprints were impressed on the window screen *at the time the crime was committed*. See *State v. Miller*, 289 N.C. 1, 4, 220 S.E.2d 572, 574 (1975) (emphasis added). However, whether fingerprints

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could have been impressed *only* at the time of a particular crime is ordinarily a question of fact to be determined by the jury, "not a question of law to be determined by the court prior to admission of the fingerprint evidence." *State v. Bost*, 33 N.C. App. 673, 677, 236 S.E.2d 296, 298, *disc. review denied*, 293 N.C. 254, 237 S.E.2d 537 (1977). As our Supreme Court stated in *State v. Irick*:

The only limitation this Court has imposed on the admissibility of fingerprint comparisons to prove the identity of the perpetrator of a crime is a requirement that the testimony be given by an expert in fingerprint identification. We have repeatedly said that the testimony of a fingerprint expert is "competent as evidence tending to show that defendant was present when the crime was committed and that he at least participated in its commission."

The probative force, not the admissibility, of a correspondence of fingerprints found at the crime scene with those of the accused, depends on whether the fingerprints could have been impressed only at the time the crime was perpetrated. Ordinarily, the question of whether the fingerprints could have been impressed only at the time the crime was committed is a question of fact for the jury. It is not a question of law to be determined by the court prior to the admission of fingerprint evidence.

State v. Irick, 291 N.C. 480, 488-89, 231 S.E.2d 833, 839-40 (1977) (citations omitted) (quoting *State v. Tew*, 234 N.C. 612, 617, 68 S.E.2d 291, 295 (1951)).

Therefore, when a properly qualified fingerprint expert offers evidence prints found at a crime scene are those of the individual charged with the offense, the expert's testimony is relevant to show the accused was present at the scene on some occasion. *Bost*, 33 N.C. App. at 676, 236 S.E.2d at 298. However, the probative value of such evidence upon the question of the accused's guilt "depends upon the strength of evidence of circumstances from which the jury might find that the fingerprints could have been impressed only at the time the crime was committed." *Id.* The question of the "substantiality" of the fingerprint evidence may be considered later by the court in ruling on a motion to dismiss based upon insufficiency of the evidence. *See, e.g., Irick*, 291 N.C. at 491-92, 231 S.E.2d at 841 (quoting *State v. Miller*, 289 N.C. 1, 4, 220 S.E.2d 572, 574 (1975)) ("Fingerprint evidence, standing alone, is sufficient

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to withstand a motion for nonsuit only if there is 'substantial evidence of circumstances from which the jury can find that the fingerprints could only have been impressed at the time the crime was committed.'"); *see also* discussion *infra* part III.

Examining the record in view of the foregoing principles, we observe the crime scene expert testified he processed the window screen and found three latent prints. These were compared with those of defendant by the fingerprint identification expert who determined two matched. There was no error by the trial court in permitting the fingerprint evidence, and this assignment of error is without merit.

II.

[2] Defendant next maintains the trial court erred by admitting evidence of DNA profile testing. Specifically, defendant contends the DNA evidence should have been excluded because (A) the methodology used by the F.B.I. in determining a statistical compilation of the frequency of a matching DNA "print" was insufficiently reliable for the results derived therefrom to be admissible, and (B) defendant was denied his constitutional rights to effective confrontation of witnesses by inability to cross-examine the individual who actually conducted and directly observed the F.B.I.'s DNA testing. For the reasons which follow, we are not persuaded by defendant's arguments.

A.

Preliminarily, it is necessary briefly to review the process of DNA analysis. In simplistic terms, long double-stranded molecules called DNA are found in the chromosomes carried within the nuclei of all cells; DNA molecules contain each individual's genetic code and carry his or her hereditary patterns. The methodology of DNA testing is complex and the terminology difficult. *See generally Springfield v. State*, 860 P.2d 435 (Wyo. 1993); Jonathan J. Koehler, *DNA Matches and Statistics: important questions, surprising answers*, 76 *Judicature* 222, 222-29 (1993). However, the analytical procedure or "protocol" at issue in the case *sub judice* (known as restriction fragment length polymorphism or "RFLP") essentially involves taking DNA samples from blood or semen found on a victim or at the crime scene and comparing the DNA in those samples with DNA taken from the nuclei of a suspected perpetrator's blood cells.

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First, the “known” and “unknown” samples of DNA molecules are chemically cut into fragments, separated into single strands, and lined up longest to shortest. A “probing step” follows to isolate those portions of DNA molecules which are “variable,” that is, differ from one individual to another. Four specific areas of the DNA molecule are usually “probed” in the RFLP procedure. Then a process called autoradiography yields an exposed film called an “autorad” showing a pattern of fuzzy lines or bands, commonly referred to as a “DNA profile.”

Bands derived from the known and unknown samples are thereafter compared visually. If the numbers and positions of the bands on the autorad appear consistent with one another (i.e.—“line up”), they are then sized by computerized measurement with reference to “size markers” or “sizing ladders” which also appear on autorads in three parallel lanes. After visual examination and computerized measurement, an “interpretation” is made as to whether, within a specified deviation or “match window,” a “match” may be declared. Under the F.B.I. protocol, a margin of error of plus or minus 2.5% is permitted.

Finally, the statistical significance of the “match,” that is, the probability of finding identical strands of DNA in someone other than the accused, is determined. This is accomplished by ascertaining the frequency with which a particular pattern of bands will appear within a relevant population, this latter being initially established by the race of the individual involved and by references to the pertinent data base compiled by the testing agency. Defendant strenuously argues the F.B.I.’s procedures involved in this final step of statistical interpretation were not “sufficiently reliable.” As a consequence, defendant insists, he was “unfairly prejudiced” by admission into evidence of the resulting calculations. Moreover, by his contention “[t]he mere fact of a match [between DNA from defendant and from the semen found on the victim’s panties] is without meaning unless you also know the rarity of the matching pattern[.]” defendant implies evidence of the match was irrelevant.

By thus asserting lack of relevance and prejudice, defendant tracks language from the decision of our Supreme Court in *State v. Pennington*, 327 N.C. 89, 393 S.E.2d 847 (1990). In ruling evidence of DNA profile testing “generally admissible,” *id.* at 101, 393 S.E.2d at 854, the court focused on several “indices of reliability,” such as “the expert’s use of established techniques, the expert’s profes-

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sional background in the field, the use of visual aids before the jury . . . and independent research conducted by the expert." *Id.* at 98, 393 S.E.2d at 853. However, the court stated DNA test results should not *always* be admitted into evidence:

The admissibility of any such evidence remains subject to attack. Issues pertaining to *relevancy or prejudice* may be raised. For example, expert testimony may be presented to impeach the particular procedures used in a specific test or the reliability of the results obtained. In addition, traditional challenges to the admissibility of evidence such as the contamination of the sample or chain of custody questions may be presented. These issues relate to the weight of the evidence. The evidence may be found to be so tainted that it is totally unreliable and, therefore, must be excluded.

Id. at 101, 393 S.E.2d at 854 (emphasis added) (citation omitted) (quoting *State v. Ford*, 301 S.C. 485, 490, 392 S.E.2d 781, 784 (1990)).

This Court has recently amplified the above-quoted language from *Pennington*:

[W]here unfair prejudice is not clear and where there is merely conflicting expert testimony regarding interpretation of the DNA evidence or where two experts have reached differing results based on independent analyses of the DNA, the issue becomes one of credibility of the experts. In that situation the jury is obligated to determine what weight each expert's testimony should receive.

State v. Bruno, 108 N.C. App. 401, 409-410, 424 S.E.2d 440, 445, *disc. review denied, appeal dismissed*, 333 N.C. 464, 428 S.E.2d 185 (1993).

To support his contention of prejudice, defendant, relying primarily on expert testimony given below, outlines in his brief the three-step process followed by the F.B.I. in determining the frequency of occurrence of DNA prints matching his own:

First, the lab must have reliable information about the frequency of each allele (band) on the autorad (prints). This is done by looking at a data base consisting of the DNA prints of a number of individuals and determining the percentage of bands that fall within the same "bin" as the band in question. For example, if three percent of the bands in the database fall

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within the same bin as the band in question, the band is assigned a frequency of .03 or 3 percent.

The second part is to determine the frequency of genotypes. A genotype is the pair of bands produced by a given probe. One band is inherited from the mother and one from the father. To determine the frequency of heterozygous (two band) genotypes, the F.B.I. uses the formula $2pq$ where p and q are the frequencies of the two alleles (bands) in the genotype. If the frequency of band A is .03 and the frequency of band B is .05, the F.B.I. lab multiplies $.03 \times .05 \times 2$. This makes the genotype AB frequency .003 (3 in 1000).

The final step is to determine the frequency of the entire DNA print (all bands in combination). The product rule is used. The product rule specifies the joint probability of several events in cases where the events are statistically independent. If four probes were used, step two would have produced four genotype frequencies. These frequencies are then multiplied together to obtain the frequency of the entire DNA print.

Defendant then argues the foregoing procedure assumes bands in DNA "prints" comprising the F.B.I. data base are statistically independent of each other and that each provides independent information. He disputes the validity of these assumptions because:

[T]here are only limited samples, a limited database, from which the F.B.I. can estimate the population frequencies of the various DNA sequences.

The database used by the F.B.I. for a black population in the present case consisted of only 500 individuals. The F.B.I.'s assumptions fail to take into consideration population substructure or that traits have different frequencies in different population subgroups. In fact, the F.B.I. has no way of knowing *anything* about what the subgroups are or even if all contributors to their black population database are black persons, genetically speaking.

Such a subgroup would be a community of "black persons who live in a relatively isolated, rural community. There may be an extraordinary degree or [sic] intermarriage or inbreeding within these subpopulations. If mating is not random, the subpopulation may not be in so-called Hardy-Weinberg equilibrium, and the frequencies within the subpopulation may deviate from

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the frequencies obtaining in the broader group.” (Quoting Giannelli & Imwinkelreid, *Scientific Evidence* 129 (1991 Supp.)).

The Hardy-Weinberg equilibrium is a principle used in population genetics that asserts that so long as certain criteria are met, the frequencies of the alleles (bands, genes) are going to remain constant from generation to generation.

In sum, defendant contends the F.B.I.’s data base is too small to permit use of the product rule and fails to take population substructure into consideration. Additionally, defendant suggests the record in this case is without evidence of specific testing performed by or for the F.B.I., or the results therefrom, to determine if its black population data base is in Hardy-Weinberg equilibrium.

At defendant’s trial, the State’s witnesses Dr. Adams and Dr. Weir, and defendant’s witnesses Dr. Schanfield and Dr. Emigh, were declared experts in their respective fields. Each explained various aspects of the DNA testing process and how they reached their individual opinions. Furthermore, the experts used visual aids to assist the jury, “so that the jury [was] not asked ‘to sacrifice its independence by accepting [the] scientific hypotheses on faith.’ ” *Pennington*, 327 N.C. at 98, 393 S.E.2d at 853 (second alteration in original) (quoting *State v. Bullard*, 312 N.C. 129, 151, 322 S.E.2d 370, 382 (1984)).

Contrary to defendant’s evidence and his assertions regarding the inherent unreliability of the F.B.I.’s statistical DNA methodology, is evidence from Dr. Weir. Testifying as an expert in statistics and population genetics, he explained a statistical mechanism is employed to accommodate the F.B.I. data base size restriction, and that population substructure concerns (“defendant’s ethnic background, where he lived”) are irrelevant since the F.B.I.’s frequency calculations are done under the assumption the particular defendant did *not* donate the DNA material in question. In addition, he testified the product rule is appropriate for the data base of black individuals maintained by the F.B.I. When asked if “[t]he method by which the F.B.I. gathered their data base and applied the data base to this case” is “generally accepted in the population genetics community,” Dr. Weir responded, “[i]t is certainly accepted by the people who have had opportunity to examine the data.” Also, Dr. Weir’s own calculations were made using the F.B.I.’s data bases. Finally, the record affirmatively reflects testimony by Dr. Adams that two individuals, including Dr. Weir, have examined

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the F.B.I.'s data base and have "shown that [the] data are in Hardy-Weinberg equilibrium for the different probes" used by the F.B.I.

While the expert testimony presented at defendant's trial was "conflicting," *Bruno*, 108 N.C. App. at 410, 424 S.E.2d at 445, in that defendant offered evidence "to impeach the particular procedures used in a specific test [and] the reliability of the results obtained," *Pennington*, 327 N.C. at 101, 393 S.E.2d at 854 (citation omitted), the resultant crucial issue was one of "credibility of the experts" and it was for the jury "to determine what weight each expert's testimony" should have received. *Bruno*, 108 N.C. App. at 410, 424 S.E.2d at 445. Mere "conflicting expert testimony" regarding F.B.I. statistical procedures neither suggests prejudice so "unfair," nor shows those procedures were so "totally unreliable," as to require exclusion from evidence of the resulting compilations. *Id.* at 409-10, 424 S.E.2d at 445. Dr. Adams testified the likelihood of a person's having defendant's DNA profile was 1 in 2.7 million, Dr. Schanfield that it was 1 in 237,000, and Dr. Weir stated the figure as 1 in 2.8 million.

The trial court properly instructed the members of the jury they were the "sole judges" of the credibility of each witness and of the weight to be given the testimony of each witness, that they might "believe all or any part or none" of the testimony of each witness, and that they were not "to accept an expert witness's opinion to the exclusion of the facts and circumstances disclosed by other testimony." It was for the jury, therefore, to determine the credibility and weight to give each opinion, and defendant was not, as he insists, "unfairly prejudiced" by the admission of DNA testing results. *See also State v. Jackson*, 320 N.C. 452, 456, 358 S.E.2d 679, 681 (1987) (approving *sub silentio* expert testimony defendant could not be excluded as child's father, as well as the frequency of defendant's genes in black population, the "likelihood of paternity," and the "paternity index"). Because defendant's contentions of "unfair prejudice" from the admission of statistical probabilities of a "match" in DNA samples are thus unfounded, his derivative argument regarding irrelevance of "match" evidence must also fail.

[3] In considering defendant's assertion of prejudice, we also note the procedural context in which he argues unreliability of the DNA evidence presented by the State. At trial, upon motions by defendant *in limine* for a pretrial hearing on DNA evidence and to sup-

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press DNA evidence, the court conducted a *voir dire* hearing at which *only* Dr. Adams of the F.B.I. testified. While defendant filed a brief with the trial court, (not included in the record, *see* N.C.R. App. P. 9(a)(3)(i); 28(a)), he offered no evidence at the hearing and specifically no testimony from either of his expert witnesses. In arguing the motions, defendant's trial counsel advised he had decided to "reserve . . . to the jury" the issue of reliability of the F.B.I.'s DNA testing, nonetheless asserting the evidence was inadmissible upon other grounds. *See infra* § B. The court thereafter denied defendant's motions.

Having abandoned at trial his argument the F.B.I.'s DNA testing was unreliable, and having failed to put forth expert testimony on the issue at the *voir dire* hearing concerning the admissibility of the evidence, defendant may not now assign as error the trial court's decision to allow the evidence to be presented. "[A] defendant is not prejudiced . . . by error resulting from his own conduct." N.C. Gen. Stat. § 15A-1443(c) (1988). Moreover, there is a presumption the court's evidentiary rulings are proper; defendant bears the burden of demonstrating a particular ruling was in fact incorrect. *State v. Herring*, 322 N.C. 733, 749, 370 S.E.2d 363, 373 (1988). Defendant has failed to meet this burden.

[4] Defendant also complains the trial court, despite his request, failed to make findings of fact in denying the motion to suppress DNA evidence. The court agreed, with counsel's consent, to place appropriate findings in the record at a later time, but apparently failed to do so. However, where evidence is uncontroverted and the facts not in dispute, a trial court is not *required* to make findings of fact, even when provided for by statute or case law. *State v. Phillips*, 300 N.C. 678, 685-86, 268 S.E.2d 452, 457 (1980); *State v. Norman*, 100 N.C. App. 660, 663, 397 S.E.2d 647, 649 (1990), *disc. review denied, appeal dismissed*, 328 N.C. 273, 400 S.E.2d 459 (1991). As defendant presented no evidence at the *voir dire* hearing and Dr. Adams' testimony did not support defendant's contention regarding the unreliability of F.B.I. methodology, there was no factual dispute. Therefore, no findings were required to support the court's denial of defendant's motions. *Phillips*, 300 N.C. at 685, 268 S.E.2d at 457 ("[T]he necessary findings are implied from the admission of the challenged evidence.")

In addition, it bears mention the court at the conclusion of the trial indicated to counsel "[i]f there are matters that need

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my attention . . . at a later date, you can rest assured I'll cooperate," advising them the judge's home telephone number would be left with the court clerk. Defendant's counsel thus had an opportunity to reiterate his request for findings. We further note since defendant prepared the proposed record on appeal, he bore the initial responsibility regarding its content, and could have sought to have the findings included therein. See *McLeod v. Faust*, 92 N.C. App. 370, 371, 374 S.E.2d 417, 418 (1988) ("[A]ppellant . . . bears the burden of seeing that the record on appeal is properly settled and filed with this Court."); see also N.C.R. App. P. 11(b).

B.

[5] Defendant additionally contends his Sixth Amendment right to confront witnesses against him was violated by admission into evidence of DNA profile test results, since the lab technician who actually performed the tests did not testify at trial. Although Dr. Adams did not personally carry out or oversee each test procedure, he was permitted to present the results to the jury. However, he did supervise and "monitor" the technician who conducted the tests, and she made notes and took photographs at each stage of the technical process for his review.

Regarding the foundation for a testifying expert's opinion, Rule 703 of North Carolina's Evidence Code provides as follows:

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

N.C. Gen. Stat. § 8C-1, Rule 703 (1992). An expert need not base his opinion upon personal knowledge "as long as the basis for his or her opinion is available in the record or available upon demand." *Thompson v. Lenoir Transfer Co.*, 72 N.C. App. 348, 350, 324 S.E.2d 619, 620-21 (1985).

Our courts have held admission of expert opinion based on hearsay evidence not in itself admissible does not violate the Sixth Amendment guarantee of an accused's right to confront his accusers so long as the expert is available for cross-examination. *State v. Huffstetler*, 312 N.C. 92, 108, 322 S.E.2d 110, 120-21 (1984) (citing *U.S. v. Williams*, 447 F.2d 1285 (5th Cir. 1971) (*en banc*),

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cert. denied, 405 U.S. 954, 31 L.Ed.2d 231, *reh'g denied*, 405 U.S. 1048, 31 L.Ed.2d 591 (1972)), *cert. denied*, 471 U.S. 1009, 85 L.Ed.2d 169 (1985); *Cf. U.S. v. Lawson*, 653 F.2d 299, 301 (7th Cir. 1981) (introduction of expert testimony based on hearsay may create constitutional problems if there is no adequate opportunity to cross-examine the expert, and if defendant does not have access to the information relied upon by the witness), *cert. denied*, 454 U.S. 1150, 71 L.Ed.2d 305 (1982).

In the case *sub judice*, Dr. Adams supervised the testing procedure upon which his opinions were based. He was present for cross-examination and was questioned vigorously and thoroughly. In addition, the record reflects the technician's notes and photographs were available to defendant's counsel, and that defendant at no time attempted to subpoena the laboratory technician nor sought the assistance of the court in securing her presence for trial. Indeed, in arguing the DNA test results should be suppressed because of the technician's absence, defendant's counsel conceded, "[y]es, we can subpoena her and get her here. It would be difficult, because she's an out-of-state witness, but we can do that." Thus, defendant's constitutional arguments regarding the testimony of Dr. Adams are unavailing.

Based on sections A. and B. above, therefore, we hold the trial court committed no prejudicial error in denying defendant's motions to exclude evidence of DNA profile testing.

III.

[6] Defendant next assigns error to the court's denial of his motion, "made at the close of all the evidence," to dismiss the charges against him because of insufficiency of the evidence.

In support of this contention, defendant offers three arguments. First, defendant reiterates his belief that evidence of DNA profiling was insufficiently reliable and should have been excluded. We have rejected this assertion in part II above.

Defendant then once more claims the state failed to make a showing his fingerprints could only have been impressed on the victim's window frame at the time of the offense. As earlier noted, defendant's argument regarding fingerprint evidence is misplaced. "Fingerprint evidence, *standing alone*, is sufficient to withstand a motion [to dismiss] only if there is 'substantial evidence of circumstances from which the jury can find that the fingerprints

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could only have been impressed at the time the crime was committed.' " *Irick*, 291 N.C. at 491-92, 231 S.E.2d at 841 (first emphasis added); *see also State v. Rudolph*, 39 N.C. App. 293, 303, 250 S.E.2d 318, 325, *disc. rev. denied, appeal dismissed*, 297 N.C. 179, 254 S.E.2d 40 (1979). Where the State seeks to prove defendant's guilt *primarily* through the use of fingerprint evidence, moreover, a motion to dismiss "is properly denied if, in addition to testimony by a qualified expert that the fingerprints at the scene of the crime match those of the accused, there is substantial evidence of circumstances from which a jury could find that the fingerprints were impressed at the time the crime was committed." *State v. Bradley*, 65 N.C. App. 359, 362, 309 S.E.2d 510, 512 (1983) (citations omitted).

Suffice it to observe the fingerprint evidence at defendant's trial did not "stand alone," nor was it necessarily the "primary" component of the State's case. Plenary evidence, including fingerprint and DNA evidence as well as placement of defendant near the victim's apartment at the time of the crime by numerous witnesses, linked him with the offenses charged. *See, e.g., State v. Mercer*, 317 N.C. 87, 95-98, 343 S.E.2d 885, 890-92 (1986). There was "substantial evidence . . . to support a finding that the offense[s] charged [second degree rape and assault on a female] [had] been committed and that defendant committed [them]," *State v. McKinney*, 288 N.C. 113, 117, 215 S.E.2d 578, 582 (1975). Although evidence susceptible to an inference defendant's prints might have been left on the screen at an earlier time was introduced, the court is not required to exclude "every reasonable hypothesis of innocence" prior to denying a motion to dismiss. *State v. Powell*, 299 N.C. 95, 101, 261 S.E.2d 114, 118 (1980).

Finally, defendant correctly points out the victim was unable to identify him as her assailant, and descriptions she gave to investigating officers were inconsistent with other evidence of defendant's appearance at the time of the assault. However, "contradictions and discrepancies do not warrant dismissal of the case—they are for the jury to resolve." *State v. Earnhardt*, 307 N.C. 62, 67, 296 S.E.2d 649, 653 (1982). The victim's admitted inability to detail her assailant's physical characteristics with accuracy or certainty is a circumstance for the jury to consider when evaluating her testimony.

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We also note again the procedural context in which this particular assignment of error is presented. In his brief, defendant cites to a point in the record where most of the evidence had been presented, where the court and counsel were discussing the court's charge to the jury, and where defendant's counsel indeed made a motion to dismiss which was subsequently denied. However, the defense *thereafter* presented a character witness to testify on defendant's behalf, thereby "reopen[ing] its case." Dr. Weir also testified at some length as a rebuttal witness for the State at this time. The record reflects defendant made *no* motion to dismiss at the true close of *all* the evidence. N.C.R. App. P. 10(b)(3) is controlling herein:

A defendant may make a motion to dismiss the action or judgment as in case of nonsuit at the conclusion of all the evidence, irrespective of whether he made an earlier such motion. . . . However, *if a defendant fails to move to dismiss the action or for judgment as in case of nonsuit at the close of all the evidence, he may not challenge on appeal the sufficiency of the evidence to prove the crime charged.*

(Emphasis added).

Based on the foregoing, we find this assignment of error unpersuasive.

IV.

[7] Finally, we examine defendant's contention the trial court erred to his prejudice by finding "duplicitous" factors in aggravation of his sentence, thereafter sentencing him to thirty years' imprisonment for second degree rape—a term beyond the statutory presumptive sentence of twelve years. *See* N.C. Gen. Stat. §§ 14-27.3 (1986); 14-1.1 (1986); 15A-1340.4(f)(2) (Cum. Supp. 1992). Defendant's argument comports with a recent holding of our Supreme Court, and accordingly we remand the charge of second degree rape for resentencing. *State v. Kyle*, 333 N.C. 687, 430 S.E.2d 412 (1993).

Among the enumerated factors under North Carolina's Fair Sentencing Act (N.C. Gen. Stat. §§ 15A-1340.1-1340.7 (1988 and Cum. Supp. 1992)) which may be used by a trial court to "aggravate" or increase a defendant's sentence beyond the statutory "presumptive" term is the following: "[t]he defendant was armed with or used a deadly weapon at the time of the crime." § 15A-1340.4(a)(1)(i). However, § 15A-1340.4(a) mandates "the same

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item of evidence may not be used to prove more than one factor in aggravation." While the sentencing form used by the court in the case *sub judice* was modelled closely after the statute, it varies in minor detail. Pertinently, § 15A-1340(a)(1)(i) is divided on the form into two possible aggravating factors, designated as 9.a. and 9.b. The trial court placed an "X" beside each of these on the sentencing form, indicating it found as aggravating factors both that "defendant was armed with a deadly weapon at the time of the crime," (designated 9.a.) and that "defendant used a deadly weapon at the time of the crime" (9.b.). The court also specifically found two factors in mitigation of defendant's sentence: "defendant has no record of criminal convictions," and "defendant has been a person of good character or has had a good reputation in the community in which he lives."

Defendant argues the trial judge erroneously used "the same item of evidence [i.e.—his possession of a knife] . . . to prove more than one factor in aggravation" of his sentence in violation of § 15A-1340.4(a). He insists in order to *use* a deadly weapon (the aggravating factor set forth in 9.b.), an individual must necessarily also be *armed* with it at the time of the crime (the aggravating factor set forth in 9.a.). Defendant further asserts the notations on the sentencing form reflect the court's perception the same item of evidence supported findings of two separate aggravating factors, and that misconception in turn could have affected the manner in which the court thereafter balanced the factors, resulting in the erroneous and prejudicial determination those in aggravation outweighed those in mitigation.

Defendant's position finds support in *State v. Kyle*:

[T]his statute [§ 1340.4(a)(1)(i)] was intended to encompass two kinds of conduct: (1) the actual use of a deadly weapon in the commission of a crime, and (2) merely having a weapon in one's possession at the time of the crime. The fact that both of these factors in aggravation are listed on the appropriate sentencing form merely affords a sentencing court with a mechanism for aggravating a crime where a defendant merely arms himself with a deadly weapon at the time of the crime but does not actually use it in the commission of the offense. In this case, the evidence shows that defendant used a deadly weapon in the commission of the crimes of burglary and kidnapping. *Defendant could not use a deadly weapon in the commis-*

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sion of the offenses without also being armed with a deadly weapon at the time of the crimes. We conclude that the trial court improperly found these two factors in aggravation based upon the same evidence. We therefore conclude that defendant is entitled to a new sentencing hearing on his convictions for burglary and kidnapping.

Kyle, 333 N.C. at 705, 430 S.E.2d at 422 (emphasis added) (citation omitted).

In defendant's case, evidence he possessed a knife at the victim's apartment was used to support the court's findings both that defendant was armed (9.a.) and that he used a deadly weapon in perpetrating his attack on the victim (9.b.). The victim testified defendant was armed when he first made contact with her; she "immediately . . . felt a cold substance on [her] neck," and he subsequently threatened to kill her if she did not comply with his demands. In addition, she testified he used the knife during the commission of the rape: he forced her legs open, and "he [was] holding what I [felt] to be a knife with his left hand" Thus defendant *used* a knife in the commission of second degree rape from his initial entry into the victim's room until his departure. Under *Kyle*, defendant's use of a deadly weapon presupposes he was armed with it at the time. Therefore, the court erroneously used the same evidence to prove two distinct factors in enhancing defendant's sentence.

"[W]here an aggravating factor was incorrect, the trial judge could not have properly balanced the aggravating and mitigating factors" *State v. Taylor*, 74 N.C. App. 326, 328, 328 S.E.2d 27, 29, *disc. review denied*, 314 N.C. 547, 335 S.E.2d 319 (1985); *see also State v. Davy*, 100 N.C. App. 551, 560, 397 S.E.2d 634, 639, *disc. review denied, appeal dismissed*, 327 N.C. 638, 398 S.E.2d 871 (1990). Accordingly, the case must be remanded for resentencing. *Davy*, 100 N.C. App. at 560, 397 S.E.2d at 639. As our Supreme Court has stated:

[I]t must be assumed that every factor in aggravation measured against every factor in mitigation, with concomitant weight attached to each, contributes to the *severity* of the sentence—the quantitative variation from the norm of the presumptive term. It is only the sentencing judge who is in a position to re-evaluate the severity of the sentence imposed in light of the adjustment. For these reasons, *we hold that in every*

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case in which it is found that the judge erred in a finding or findings in aggravation and imposed a sentence beyond the presumptive term, the case must be remanded for a new sentencing hearing.

State v. Ahearn, 307 N.C. 584, 602, 300 S.E.2d 689, 701 (1983) (second emphasis added); *see also State v. Chatman*, 308 N.C. 169, 180-81, 301 S.E.2d 71, 78 (1983).

While this may well be one of the "many cases where, on remand, the trial judge will properly reach the same result absent the erroneous finding," *Ahearn*, 307 N.C. at 602, 300 S.E.2d at 700-01, defendant is entitled to understand the basis for the court's decision to sentence him to a term beyond that presumptively imposed by law.

Having thus fully examined each of defendant's assignments of error, we find no prejudicial error in the guilt phase of his trial. However, for the reasons discussed hereinabove, we remand for resentencing the charge of second degree rape.

89 CRS 39361, Counts I & II—No error in the trial.

89 CRS 39361, Count I—Remand for resentencing.

Judges EAGLES and MARTIN concur.

JOSEPH E. SMITH, GEORGE V. SMITH, NICKOLAS W. SMITH, JESSE B. SMITH
AND ANNIE SMITH, PLAINTIFFS v. STUART R. CHILDS, DEFENDANT

No. 9126SC1224

(Filed 7 December 1993)

**1. Pleadings §§ 375, 401 (NCI4th)— amendments to complaint—
after evidence introduced—no abuse of discretion**

The trial court did not abuse its discretion in a legal malpractice action by allowing plaintiffs' motion to amend their pleadings where plaintiffs went to trial upon their previously amended complaint alleging negligence in defendant's failure to advise them of the legal implications of a contract to purchase real estate, a promissory note and purchase money deed

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of trust, and a subordination agreement, and the court allowed their motion at the close of plaintiffs' evidence to add further allegations of negligence. One of the new issues was sufficiently pled in the complaint, and defendant impliedly consented to trial on the remaining new issues because evidence supporting those issues did not tend to support any properly pled issue and defendant never specifically objected to that evidence as being outside the scope of the pleadings. Moreover, defendant suffered no prejudice in that defendant moved for a directed verdict on the allegations in the complaint and the additional contentions "that are not alleged" before plaintiffs moved to amend, and thus understood that additional issues were being raised. N.C.G.S. § 1A-1, Rule 15(b).

Am Jur 2d, Pleading §§ 319-331.**2. Evidence and Witnesses §§ 2150, 2152 (NCI4th)— legal malpractice—expert opinion testimony—permissible scope**

The trial court erred in a legal malpractice action by allowing plaintiffs' expert to testify as to legal conclusions regarding a purchase money deed of trust and personal guaranties. While legal experts may testify regarding the factual issues facing the jury, they are not allowed to either interpret the law or to testify as to the legal effect of particular facts. Expert testimony here that language in a purchase money deed of trust did not provide plaintiffs with adequate protection in the event of subordination should have been excluded because the expert was allowed to give his interpretation of the contract; furthermore, the expert should not have been allowed to give his individual interpretation of N.C. law on personal guaranties.

Am Jur 2d, Expert and Opinion Evidence §§ 47 et seq., 136 et seq.**3. Damages § 49 (NCI4th)— legal malpractice—purchase money deed of trust and personal guaranty—mitigation of damages**

The trial court did not err by denying defendant's motions for judgment n.o.v. and directed verdict in a legal malpractice action where defendant alleged that the proximate cause of plaintiffs' losses was plaintiffs' failure to enforce either a note or a personal guaranty. Defendant's argument is actually based on an alleged failure to mitigate damages, but a reasonable

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person would have concluded at the time of the default that an attempt to enforce the purchase money note or the personal guaranty would be unsuccessful. N.C.G.S. § 45-21.38.

Am Jur 2d, Damages §§ 492 et seq.**4. Damages § 151 (NCI4th)— legal malpractice—damages— instructions—exclusive nature of injuries**

The trial court erred in its instructions on damages in a legal malpractice action involving a purchase money deed of trust and personal guaranty by instructing the jury that the damages recoverable would include the fair market value of the subject property at the time of the hypothesized foreclosure sale, less the expenses of the foreclosure proceedings. The instructions were erroneous because plaintiffs' claim was based on several alleged acts of negligence and the instructions did not present the proper measure of damages under one of the theories; the jury was not instructed on the exclusive nature of the theories; and the jury was not charged to consider monies plaintiffs actually received from the sale of their land. Although the remand would ordinarily be solely on the issue of damages, the errors make it impossible to determine the allegation upon which the jury ultimately based its verdict and the remand was for a new trial.

Am Jur 2d, Damages §§ 988 et seq.

Appeal by defendant from judgment entered 2 September 1991 by Judge Dexter Brooks in Mecklenburg County Superior Court. Heard in the Court of Appeals 10 November 1992.

Griffin, Caldwell, Helder & Lee, P.A., by Thomas J. Caldwell and R. Kenneth Helms, Jr.; and Walker & Walker, by John G. Walker, for plaintiff-appellees.

Bailey & Dixon, by Gary S. Parsons, Alan J. Miles and Lauren A. Murphy; and Jones, Hewson & Woolard, by Harry C. Hewson and Kenneth H. Boyer, for defendant-appellant.

JOHN, Judge.

In this legal malpractice action, defendant appeals a judgment finding him negligent and ordering him to pay plaintiffs \$900,000. Defendant contends the trial court erred (1) by allowing plaintiffs

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to amend their previously amended complaint; (2) by allowing plaintiffs' expert witness to testify to certain legal conclusions; (3) by failing to determine plaintiffs were entitled to a deficiency judgment against the debtor based upon the underlying land transaction; (4) by denying his motion for a directed verdict on the issue of damages; (5) by failing to instruct on the proper measure of damages; and (6) by refusing to accept the jury's original verdict. We agree in part and remand for a new trial.

The evidence presented at trial tended to show the following: around 1980 plaintiffs inherited a twelve acre tract of land located on U.S. Highway 29 in Mecklenburg County. Shortly thereafter, several persons contacted plaintiffs and expressed an interest in purchasing this property.

At some point, plaintiffs entered into negotiations with J. W. Wood (Wood). Plaintiffs and Wood reached provisional accord on a purchase price for the property and thereafter plaintiffs retained defendant as legal counsel to represent them. Plaintiffs informed defendant the following terms had been tentatively agreed upon: (1) a purchase price of \$710,000, of which plaintiffs were to receive \$10,000 as earnest money, \$100,000 at closing, and a \$600,000 promissory note secured by a purchase money deed of trust; and (2) payments on the note were to be made in five equal annual installments.

Defendant thereafter entered into formal negotiations with Wood, secured some additional terms favorable to plaintiffs (including a higher interest rate), and on 28 December 1984 plaintiffs executed a land sale contract to convey the property. At closing on 16 May 1985, the purchasers (Wood, Marc Birnbaum and Uri Sheinbaum) executed a promissory note and a purchase money deed of trust. The promissory note provided for five annual installments of \$120,000 and a 12.5% annual interest rate. The deed of trust described the property as being divided into two tracts, Tract 1 of 12.08 acres and Tract 2 of .04 acres. The deed of trust instrument also contained the following provision:

[T]he Grantor shall have the right and power by itself without the signature, approval or consent of either the Beneficiary or Trustee to subordinate the lien created by this Deed of Trust to any first lien or liens for any of the purposes described above [for development loans, construction loans, permanent financing, or otherwise], provided such liens do not exceed

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\$8,000,000 . . . and . . . the Grantor has . . . delivered to Beneficiary a guaranty of payment

The first installment was not paid when due and defendant wrote Wood, stating he had fifteen (15) days to cure the default. This was not done, but, after consulting defendant, plaintiffs agreed: (1) to subordinate their purchase money deed of trust to a deed of trust held by First Federal Savings & Loan of Laredo, Texas (First Federal) which secured a \$380,000 loan to Wood; and (2) to receive a personal guaranty from Wood for the full amount of the promissory note. Thereafter, on 18 June 1986, plaintiffs received the first installment (due on 15 May 1986) with interest totalling \$207,753.42.

In May 1987, the purchasers again defaulted and Wood also defaulted on the First Federal loan. Defendant thereafter wrote plaintiffs recounting these events and advising "you may wish to have another lawyer look at this letter" In November 1987, First Federal foreclosed and purchased the property for \$430,226—the amount outstanding on its note plus the costs of foreclosure. Plaintiffs neither participated in these foreclosure proceedings nor received any monies thereunder.

After employing new counsel, plaintiffs filed a complaint (and later an amended complaint) alleging defendant had been negligent in giving legal advice throughout the land transaction. The case went to trial and at the close of plaintiffs' evidence, the trial court allowed plaintiffs to amend their amended complaint. Ultimately, the jury returned a verdict finding defendant negligent and awarding plaintiffs \$480,000 "with interest to date at 13.5% plus total attorney fees and court costs." Over defendant's objections, the verdict sheet was returned to the jury for further deliberations which resulted in a verdict of \$900,000.

I.

[1] Defendant argues the trial court erred by allowing plaintiffs to amend their previously amended complaint. We disagree.

Plaintiffs proceeded to trial upon their amended complaint (the complaint) charging defendant with negligence in failing to advise plaintiffs of the legal implications of (1) the 28 December 1984 contract to purchase, (2) the 16 May 1985 promissory note and purchase money deed of trust, and (3) the 6 June 1986 subordination agreement, as well as failing to advise them properly in (4) his

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26 June 1987 letter. At the close of plaintiffs' evidence, the parties made several motions. In reliance upon the applicable statute of repose, the court granted defendant's motion for a directed verdict on all allegations concerning matters leading to the execution of the promissory note and deed of trust. However, the court also allowed plaintiffs' motion to amend their complaint in order to allege the following:

The defendant was negligent in that he:

(a) Failed to advise and inform the plaintiffs that at the time the purchase money note and deed of trust were in default that plaintiffs had the absolute right to foreclose their deed of trust thereby getting their property back or receiving the balance owed them in the event some party out bid them and/or to negotiate the terms of the original sale, including renegotiation of the subordination provision;

(b) Failed to advise and inform the plaintiffs that they clearly were not required to subordinate as required by the Contract of Sale and purchase money deed of trust;

(c) Failed to advise and inform the plaintiffs of the continuing inherent risks of the transaction as structured in the Contract of Sale and in the Purchase money deed of trust;

(d) Failed to require that the proceeds from the \$380,000 loan to which the plaintiffs subordinated be used to improve the property.

In pertinent part, N.C.R. Civ. P. 15(b) allows for amendment of the pleadings and provides: "[w]hen issues not raised by the pleadings are tried by the express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings." Implied consent exists when evidence in support of an unpleaded issue is introduced and the opponent fails to *object specifically* to this evidence as being outside the scope of the pleadings. *Eudy v. Eudy*, 288 N.C. 71, 76, 215 S.E.2d 782, 786 (1975), *overruled on other grounds*, *Quick v. Quick*, 305 N.C. 446, 290 S.E.2d 653 (1982); *Mobley v. Hill*, 80 N.C. App. 79, 81, 341 S.E.2d 46, 47-48 (1986). Under modern practice, amendments should be freely allowed. *Mobley v. Hill*, 80 N.C. App. at 81, 341 S.E.2d at 47.

While Rule 15(b) has the practical effect of repealing the former strict rule against variance, it does not permit judgment by ambush.

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Eudy v. Eudy, 288 N.C. at 76, 215 S.E.2d at 786. "Where the evidence which supports an unpleaded issue also tends to support an issue properly raised by the pleadings, no objection to such evidence is necessary and the failure to object does not amount to implied consent to try the unpleaded issue." *Tyson v. Ciba-Geigy Corp.*, 82 N.C. App. 626, 630, 347 S.E.2d 473, 476 (1986). Nonetheless, a trial court's ruling on a Rule 15(b) motion is not reviewable absent a showing of an abuse of discretion. *Id.*

Applying these principles to the case *sub judice*, we observe one of the "new" issues, *issue (c)*, was sufficiently pled in the complaint and therefore defendant had notice and may not complain of its amendment. Defendant may also not complain of the remaining "new" issues. *Issue (d)* deals with defendant's alleged negligence *at the time the 6 June 1986 subordination agreement was executed*. Although allegations in the complaint encompassed related matters, these were directed towards defendant's conduct *at the time the deed of trust was executed—more than one year before the time referred to in issue (d)*. Accordingly, evidence relative to issue (d) would not tend to support any properly pled issue. With regard to *issues (a) and (b)*, no assertions in the complaint encompassed these matters and no evidence pertinent to these unpled issues tended to support a properly pled issue. Because evidence sustaining issues (a), (b) and (d) did not tend to support any properly pled issue and because defendant never specifically objected to that evidence as being outside the scope of the pleadings, he impliedly consented to trial on these issues. See *Mobley v. Hill*, 80 N.C. App. at 81, 341 S.E.2d at 347-48.

Moreover, the trial court has broad discretionary authority to permit amendment to the pleadings at any time, in particular where the opposing party will suffer no prejudice and the amendment will serve to present the action on its merits. See *Williams v. Sapp*, 83 N.C. App. 116, 118, 349 S.E.2d 304, 305 (1986). In the present case, even before plaintiffs moved to amend, defendant moved for a directed verdict on the allegations in the complaint and "the additional contentions . . . that are not alleged." Defendant thus understood additional issues, other than those set out in the pleadings, were being raised. Furthermore, defendant declined the court's offer of a limited continuance to further prepare a defense to the "new" unpled allegations. Thus, defendant has suffered no prejudice as a result of the amendment.

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Based upon the foregoing considerations, we hold the trial court did not abuse its discretion in allowing plaintiffs' motion to amend.

II.

[2] We next address defendant's contention the trial court erred by allowing plaintiffs' expert witness, a Union County attorney, to testify as to legal conclusions. According to defendant, the expert's testimony improperly invaded the trial court's province to determine the legal effect of the purchase money note and the guaranty executed by Wood as well as the meaning of certain language in these documents. We agree.

A.

The permissible scope of expert opinion testimony in a legal malpractice trial has not been frequently explored by our appellate courts. As we herein remand for a new trial based upon a later assignment of error, it is appropriate to examine principles which have previously been established and to thereafter address defendant's arguments in some detail.

Preliminarily, "[t]he general expert testimony rules applicable in all civil cases apply to legal malpractice actions." Breslin and McMonigle, *The Use of Expert Testimony in Actions Against Attorneys*, 47 Ins. Couns. J. 119, 119-20 (1980), *cited with approval in Rorrer v. Cooke*, 313 N.C. 338, 356, 329 S.E.2d 355, 366 (1985). Thus, as a general rule, expert testimony is admissible when the expert's specialized expertise will assist the trier of fact in understanding the evidence or in determining a fact in issue. N.C.R. Evid. 702. Pursuant to N.C.R. Evid. 704, expert opinion testimony may even embrace an ultimate issue to be decided by the trier of fact. *HAJMM Co. v. House of Raeford Farms, Inc.*, 328 N.C. 578, 585, 403 S.E.2d 483, 488 (1991).

In determining whether particular expert testimony should be admitted, "the inquiry should be not whether it invades the province of the jury, but whether . . . the witness because of his expertise is in a better position to have an opinion on the subject than is the trier of fact." *State v. Wilkerson*, 295 N.C. 559, 568-69, 247 S.E.2d 905, 911 (1978); Rule 704 official commentary. *There are, nevertheless, limitations on the admissibility of expert opinion testimony.* An expert is not allowed to testify that a particular legal standard, or legal term of art, has been met. *HAJMM*,

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328 N.C. at 586, 403 S.E.2d at 488. Terms such as, "testamentary capacity," and "premeditation and deliberation" are legal conclusions premised upon particular underlying facts. When the expert witness is *an expert legal witness*, the avoidance of testimony regarding legal conclusions can be problematical since attorneys deal with legal terms of art on a daily basis. However, while an expert may testify to the existence of the factual components, he may not testify as to the legal conclusions; such testimony invades the court's province to determine the applicable law and to instruct the jury on that law. *HAJMM*, 328 N.C. at 586-87, 403 S.E.2d at 488-89. The official commentary following Rule 704 provides a helpful example of this distinction:

[T]he question "*Did T have capacity to make a will?*" would be excluded, while the question, "*Did T have sufficient mental capacity to know the nature and extent of his property and the natural objects of his bounty and to formulate a rational scheme of distribution?*" would be allowed.

(emphasis added).

Other difficulties may also arise because of the nature of the action. Proof of legal malpractice necessitates an attempt to show what should have occurred without some error on the part of the attorney. Mallen & Smith, *Legal Malpractice* § 27.7 (1989). Accordingly, these cases often involve interpreting *the law itself* and posing such questions as "*Did the attorney make an error of law?*" Unlike most other experts, the legal expert is well versed in the law and has knowledge of the *legal issues* facing the court. However, while the legal expert may testify regarding the factual issues facing the jury, he is *not allowed* to either *interpret the law* or *to testify as to the legal effect of particular facts*. See *Wise v. Wise*, 42 N.C. App. 5, 7, 255 S.E.2d 570, 572, *disc. review denied*, 298 N.C. 305, 259 S.E.2d 300 (1979). Allowing expert testimony on these matters would amount to a jury instruction on the applicable law, thereby improperly invading the province of the court. *Williams v. Sapp*, 83 N.C. App. 116, 119-120, 349 S.E.2d 304, 306 (1986); *see also Board of Transportation v. Bryant*, 59 N.C. App. 256, 260-61, 296 S.E.2d 814, 817 (1982).

B.

In the case *sub judice*, defendant objects to the expert's testimony concerning: (1) the subordination provision of the purchase money deed of trust and (2) the purchasers' personal guaranty.

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Regarding the first matter, plaintiffs' legal expert was asked to review a clause in the purchase money deed of trust which required the subordination of plaintiffs' lien to any new lien for "development loans, construction loans, permanent financing, or otherwise." Over defendant's objection, the expert expressed his opinion the language "or otherwise" did not adequately limit the use of any new loan proceeds and thus did not provide plaintiffs with adequate protection in the event of subordination.

By means of this testimony, the expert was allowed to give his interpretation of the contract. A contract which is plain and unambiguous on its face will be interpreted by the court as a matter of law; however, if the contract is ambiguous, interpretation of the contract is a question for the jury. *Thompson-Arthur Paving Co. v. Lincoln Battleground Associates, Ltd.*, 95 N.C. App. 270, 280, 382 S.E.2d 817, 823 (1989). Even assuming the contract was ambiguous, the expert's testimony should not have been allowed. It is generally accepted that if technical terms are used in a contract, expert testimony is admissible to explain the meaning of such terms as an aid in interpreting the instrument. *See Stewart v. Railroad*, 141 N.C. 253, 262-63, 53 S.E. 877, 880 (1906); 32 C.J.S. *Evidence* § 546(74) (1964). However, "[w]hen the jury is in as good a position as the expert to determine an issue, the expert's testimony is properly excludable because it is not helpful to the jury." *Braswell v. Braswell*, 330 N.C. 363, 377, 410 S.E.2d 897, 905 (1991), *reh'g denied*, 330 N.C. 854, 413 S.E.2d 550 (1992). Moreover, the opinion of an attorney as to the legal effect of a document is generally not admissible. 32 C.J.S. *Evidence* § 546(86). Here, the expert's testimony was not offered to explain any technical terms, or for any other valid purpose, and therefore should have been excluded.

Plaintiffs' expert was also allowed to testify "the value of a personal guaranty of a purchase money debtor, in my experience is virtually worthless. It has not been settled in the law that that particular kind of guaranty in a purchase money deed of trust and note situation is enforceable." By this testimony the expert gave his individual interpretation of North Carolina law; this was improper as it amounted to no more than a jury instruction on the law relating to personal guaranties. *See Williams v. Sapp*, 83 N.C. App. 116, 120, 349 S.E.2d 304, 306 (1986).

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Since we are remanding for a new trial on other grounds, it is unnecessary to determine whether defendant suffered prejudice as a result of the expert's erroneously admitted testimony.

III.

[3] Defendant further contends the trial court should have determined as a matter of law plaintiffs could (1) seek a deficiency judgment on the purchase money note and (2) enforce Wood's personal guaranty. Specifically, defendant argues the court erred by denying his motions for directed verdict and judgment notwithstanding the verdict (JNOV) since the proximate cause of plaintiffs' losses was plaintiffs' failure to enforce either the note or the personal guaranty. We are not persuaded by defendant's argument.

As a motion for JNOV is simply a motion that judgment be entered in accordance with an earlier directed verdict motion, the same standards are used to review both motions. *Everhart v. LeBrun*, 52 N.C. App. 139, 141, 277 S.E.2d 816, 818 (1981). In ruling upon a motion for JNOV, the evidence must be viewed in the light most favorable to the non-moving party. *Id.* JNOV should be entered only where the evidence, so considered, is insufficient to support a verdict for the non-moving party. *Summer v. Allran*, 100 N.C. App. 182, 183, 394 S.E.2d 689, 690 (1990), *disc. review denied*, 328 N.C. 97, 402 S.E.2d 428 (1991).

While defendant categorizes his argument as plaintiffs' failure to establish the element of *proximate cause*, his contention is actually premised upon the related principle of *failure to mitigate damages*. *Proximate cause* is an element of a negligence action and thus a plaintiff must establish this element in order to recover. See *Johnson v. Ruark Obstetrics and Gynecology Associates, P.A.*, 327 N.C. 283, 304, 395 S.E.2d 85, 97, *reh'g denied*, 327 N.C. 644, 399 S.E.2d 133 (1990). The failure to mitigate damages, meanwhile, is a *defense* which "preclude[s] recovery for those consequences of the tortfeasor's act which could have been avoided by acting as a reasonable prudent man" *Radford v. Norris*, 63 N.C. App. 501, 502, 305 S.E.2d 64, 65 (1983). As with other defenses, the burden is on defendant to show plaintiff neglected to mitigate damages. *Gibbs v. Western Union Telegraph Co.*, 196 N.C. 516, 522, 146 S.E. 209, 213 (1929).

In a negligence action, it is well settled the party wronged must use due care to minimize the loss occasioned by defendant's

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negligence. *Gibbs v. Western Union*, 196 N.C. at 522, 146 S.E.2d at 213; N.C.P.I., Civ. 810.49; 25 C.J.S. *Damages* § 33 (1966). Unlike a plaintiff's failure to establish the *element* of proximate cause, the failure to mitigate damages is *not* an absolute bar to all recovery; rather, a plaintiff is barred from recovering for those losses which could have been prevented through the plaintiff's *reasonable efforts*. *Stimpson Hosiery Mills, Inc. v. Pam Trading Corp.*, 98 N.C. App. 543, 551, 392 S.E.2d 128, 133, *disc. review denied*, 327 N.C. 144, 393 S.E.2d 909 (1990).

The mitigation of damages rule, however, is founded upon an injured person's duty to take *reasonable* efforts to minimize loss. The rule is inapplicable where plaintiff could not possibly have avoided the loss. 25 C.J.S. *Damages* § 33. Furthermore, plaintiff need not pursue a particular corrective measure if a reasonable person would conclude the measure was imprudent, impractical, or would likely be unsuccessful. 25 C.J.S. *Damages* § 33; N.C.P.I., Civ. 810.49. In essence, the mitigation rule does not require plaintiff to grasp vainly for twigs while drowning in flood-waters of defendant's creation. Accordingly, if in the case *sub judice* a reasonable person would not have attempted to enforce either (1) *the purchase money note* or (2) *Wood's personal guaranty*, defendant would not be entitled to JNOV on the issue of damages based upon plaintiffs' failure to mitigate.

A. The Promissory Note.

The question here is whether North Carolina's anti-deficiency statute prohibits the holder of a purchase money promissory note secured by a junior deed of trust from enforcing the note once the security has been "destroyed" by foreclosure of the senior deed of trust. In pertinent part, our anti-deficiency statute provides:

In all sales of real property by mortgagees and/or trustees under powers of sale contained in any mortgage or deed of trust[,] . . . the mortgagee or trustee or holder of the notes secured by such mortgage or deed of trust shall not be entitled to a deficiency judgment on account of such mortgage, deed of trust or obligation secured by the same

N.C.G.S. § 45-21.38 (1991).

Both residential and commercial transactions are covered by this statute. *Barnaby v. Boardman*, 313 N.C. 565, 330 S.E.2d 600 (1985). In *Barnaby* our Supreme Court held G.S. § 45-21.38 bars

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any deficiency suit on a purchase money note either before or after foreclosure destroys the security. *Id.* at 571, 330 S.E.2d at 603. "[A] creditor is limited to the property conveyed when the note and mortgage or deed of trust are executed to the seller of the real estate and the securing instruments state that they are for the purpose of securing the balance of the purchase price." *Id.* at 571, 330 S.E.2d at 604 (quoting *Ross Realty Co. v. First Citizens Bank & Trust Co.*, 296 N.C. 366, 370, 250 S.E.2d 271, 273 (1979)). In a case similar to the one *sub judice*, this Court held G.S. § 45-21.38 bars a deficiency action on a purchase money promissory note secured by a junior deed of trust after foreclosure on the senior deed of trust. *Sink v. Egerton*, 76 N.C. App. 526, 528-29, 333 S.E.2d 520, 521-22 (1985).

Based upon *Barnaby* and *Sink* (which were binding when Wood defaulted on the purchase money note), we hold a reasonable person at the time of Wood's default would have concluded an attempt to enforce the purchase money note would likely be unsuccessful.

B. The Personal Guaranty

In this instance, the question is whether foreclosure of a senior deed of trust also prohibits the holder of a junior deed of trust from bringing an action on the debtor's personal guaranty of the outstanding debt.

While personal guaranties are not explicitly covered by G.S. § 45-21.38, the statute does preclude "a deficiency judgment on account of" a purchase money deed of trust. This Court has previously commented even a guarantor arguably could assert G.S. § 45-21.38 as a defense. *Chemical Bank v. Belk*, 41 N.C. App. 356, 368-69, 255 S.E.2d 421, 429, *disc. review denied*, 298 N.C. 293, 259 S.E.2d 911 (1979). Moreover, our Supreme Court has ruled the guarantor of a purchase money deed of trust is entitled to plead the anti-deficiency statute as a defense in an action brought on his personal guaranty. *Virginia Trust Co. v. Dunlop*, 214 N.C. 196, 198-99, 198 S.E. 645, 646 (1938). While the anti-deficiency statute at issue in *Virginia Trust* was not identical to present G.S. § 45-21.38, both statutes are similar in that guarantors are not expressly covered.

In keeping with both *Virginia Trust* and *Chemical Bank*, we hold a reasonable person at the time of Wood's default would have concluded any efforts to enforce Wood's personal guaranty would

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be unsuccessful because, in all likelihood, G.S. § 45-21.38 would operate to bar recovery.

Since a reasonable person would have concluded efforts to enforce (1) the purchase money promissory note and (2) Wood's personal guaranty would have been unsuccessful, defendant was not entitled to JNOV based upon plaintiffs' failure to mitigate damages. Plaintiffs were required to take only reasonable efforts to mitigate their damages; they were not required to attempt enforcement of either the note or the guaranty when a reasonable person would have concluded such efforts would be futile. 25 C.J.S. *Damages* § 33.

IV.

[4] Defendant also contends the trial court erred in instructing the jury on the proper measure of damages. We determine this contention has merit.

While the amount of damages is ordinarily a question of fact, the proper standard for *measuring damages* is a question of law fully reviewable by this Court. *Olivetti v. Ames Business Systems, Inc.*, 319 N.C. 534, 548, 356 S.E.2d 578, 586-87, *reh'g denied*, 320 N.C. 639, 360 S.E.2d 92 (1987). In a case of legal malpractice, the determination of proximate cause will ordinarily resolve any question as to the proper measure of damages since an attorney is liable only for those damages proximately resulting from his negligence. *See Hodges v. Carter*, 239 N.C. 517, 520, 80 S.E.2d 144, 146 (1954). More precisely, the proper measure of damages in such an action is the *difference* between (1) plaintiff's actual pecuniary position and (2) "what it should have been had the attorney not erred." 1 Mallen & Smith, *Legal Malpractice* § 16.4 (1989). The practical application of this standard will vary from case to case depending upon the nature of the attorney's undertaking for the client. *Id.* The valuation of any lost benefit is ordinarily based upon the circumstances existing at the time of the attorney's negligent act or omission. Mallen & Smith § 16.1.

In the case *sub judice*, the jury received the following instructions on the measure of damages:

A person who suffers injury or damage proximately caused by the negligence of an attorney is entitled to recover in a lump sum the present worth of all damages, past and present, which naturally and proximately result from such negligence.

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Such damages include the fair market value of the subject property at the time of the foreclosure sale, less the expenses of foreclosure proceedings on the purchase money deed of trust.

* * * * *

If you answer this issue in any amount, you should award such damages as you find from the evidence and by its greater weight is fair compensation for any damage the plaintiffs have sustained as a proximate result of the defendant's negligence.

While well-intentioned and given in the absence of any applicable pattern instruction, this portion of the court's charge was erroneous.

First, plaintiffs' claim is based upon several alleged acts of negligence. We find it necessary to discuss only two of these theories: (1) defendant's failure to inform plaintiffs of their absolute right to foreclose at the time the purchase money note and deed of trust were in default and (2) defendant's failure to require Wood to use the \$380,000 loan (to which plaintiffs subordinated their deed of trust) to improve the property. The trial court's instructions indicate the damages recoverable under *both* theories would "include the fair market value of the subject property at the time of the [hypothesized] foreclosure sale, less the expenses of foreclosure proceedings" This amount would not be the proper measure of damages under plaintiffs' second theory.

Second, the jury was not instructed on the *exclusive nature* of the aforementioned two theories. An award of damages on the *first theory* assumes plaintiffs (as plaintiff Smith testified) would have foreclosed if so advised. Had such foreclosure taken place, plaintiffs could not also have subordinated their deed of trust and the question of imposing conditions upon the use of proceeds from the \$380,000 loan (plaintiffs' *second theory*) would never have arisen. Accordingly, if damages were awarded under plaintiffs' first theory, damages could not also be awarded under plaintiffs' second theory.

Third, the jury was not charged to consider monies which plaintiffs actually received from the sale of their land. In essence, it received no instruction that plaintiffs could only be awarded the difference between (1) their present pecuniary position (with such financial benefits as they have *actually received*) and (2) their pecuniary position after the negligent acts. See discussion of *Mallen & Smith* § 16.4, *supra*; see also *Godwin v. Wilmington and Weldon Railroad Co.*, 104 N.C. 146, 147-48, 10 S.E. 136 (1889) (where defend-

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ant's negligence caused the death of plaintiff's cow, the jury was properly instructed that the measure of damages was the value of the live cow less the \$1.50 plaintiff received for the hide).

Ordinarily, where the issue of damages is affected by prejudicial error, we would remand for a new trial on solely the issue of damages. See *Munie v. Tangle Oaks Corp.*, 109 N.C. App. 336, 344, 427 S.E.2d 149, 153 (1993). However, defendant also argues the instructional errors make it "impossible to determine upon which allegation the jury ultimately based its verdict. The trial court thus erred in failing to grant [d]efendant's motion for a new trial"

As previously discussed, at least *two* of plaintiffs' theories of negligence were mutually exclusive, *i.e.*, while defendant could be found negligent under both theories, plaintiffs *cannot recover under both theories*. Unfortunately, the trial court grouped these theories together and instructed the jury they could answer the negligence question "Yes" if they found defendant negligent under any *single* theory. Thus, it is unclear whether the jury found defendant negligent under all theories or just one. Furthermore, since the jury never received an instruction regarding the exclusive nature of recovery under the aforementioned theories, it is *uncertain upon which theory damages were awarded*. The jury's verdict provides no assistance; it merely reflects: (1) defendant was negligent and (2) the amount of damages.

Our Supreme Court has recognized "[i]t is misleading to embody in one issue two propositions as to which the jury might give different responses." *Edge v. North State Feldspar Corp.*, 212 N.C. 246, 247, 193 S.E. 2 (1937). "Where a verdict is so . . . indefinite that the court cannot determine what judgment should be rendered . . . it must be set aside and a new trial awarded." *Frick Co. v. Shelton*, 201 N.C. 71, 74, 158 S.E. 837, 839 (1931); see also *Gibson v. Central Manufacturers' Mutual Ins. Co.*, 232 N.C. 712, 715-16, 62 S.E.2d 320, 322 (1950). Because in the case *sub judice* it is impossible to determine upon which mutually exclusive theory of negligence the jury awarded damages, and because the jury received an erroneous instruction on the amount of damages recoverable under one of these theories, the verdict is fatally uncertain and we are constrained to remand for a new trial.

We note with sympathy "the problems faced by a trial judge in charging the jury are complex." N.C.P.I., *Motor Vehicle Negligence*

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§ .010. This is particularly true in the area of legal malpractice where there are few established guidelines. Accordingly, we advise the trial court that upon remand any mutually exclusive theories of negligence should be independently submitted to the jury, thereby avoiding an uncertain jury verdict. Furthermore, if the jury awards damages based upon two or more mutually exclusive theories of recovery, plaintiff should choose between these damage awards. *See Mapp v. Toyota World, Inc.*, 81 N.C. App. 421, 426-27, 344 S.E.2d 297, 301, *disc. review denied*, 318 N.C. 283, 347 S.E.2d 464 (1986) (where there are two mutually exclusive theories of recovery, "plaintiff should be allowed to elect her remedy *after* the jury's verdict."). We express no opinion, however, as to whether any of plaintiffs' negligence theories would support an award of damages.

Since we are remanding for a new trial, we find it unnecessary to address defendant's remaining assignments of error as they may not arise upon re-trial.

Reversed and remanded for a new trial.

Judges EAGLES and ORR concur.

STATE OF NORTH CAROLINA v. MICHAEL SCOTT BEVERIDGE

No. 921SC931

(Filed 7 December 1993)

Searches and Seizures § 58 (NCI4th)— warrantless pat-down search—baggie in pocket—existence of contraband not immediately apparent—cocaine fruit of constitutionally impermissible search

Cocaine seized from defendant was the fruit of a constitutionally impermissible search where an officer was justified in conducting a limited pat-down of defendant to determine whether defendant was armed; the officer concluded that there was no weapon but there was a rolled-up plastic baggie in defendant's pants pocket; it was not immediately apparent to the officer that the baggie held contraband; and without some other exigency to justify the continued warrantless search

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of defendant, the officer was no longer authorized to invade defendant's privacy.

Am Jur 2d, Evidence § 415.

Judge MCCRODDEN dissenting.

Appeal by defendant from judgment entered 29 July 1992 by Judge James R. Strickland in Dare County Superior Court. Heard in the Court of Appeals 31 August 1993.

Defendant was indicted by the grand jury on 13 May 1991 for allegedly violating N.C. Gen. Stat. § 90-95, possession of cocaine. Subsequently, defendant filed a motion on 25 September 1991 seeking to suppress certain evidence pertaining to the charges against him. That motion was heard on 27 July 1991.

The State's evidence upon *voir dire* tended to show that on 30 April 1991, at 12:50 a.m., Officer Joel Johnson made a driving while impaired arrest in an area known as Avalon Beach. Officer John Gregory assisted in that arrest. As Officer Johnson was arresting the driver of the automobile, Officer Gregory secured the vehicle. The defendant was a passenger in the car.

Officer Gregory asked the defendant to leave the car and exit to the rear of the vehicle. At that time, Gregory noticed a strong odor of alcohol and also noticed that the defendant acted "giddy." He determined that the defendant was probably under the influence of alcohol, and he also believed that the defendant was under the influence of a controlled substance.

Thereafter, Officer Gregory asked the defendant if he had any weapons and advised the defendant that he was not under arrest. Gregory then explained to the defendant that he intended to search the vehicle, and that he also was going to perform a "pat-down" of the defendant's person for weapons.

During the *voir dire* hearing, on direct examination, Officer Gregory testified that:

A. He allowed me to pat him down and as I patted him down I noticed that there was something in his front pocket which was—it was a rolled up plastic bag, it was a large size plastic bag rolled up. It was cylindrical in his pocket long.

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Q. During your training, sir, as a law enforcement officer, had you received any training in controlled substances?

A. Yes, sir, I have. I received a narcotics patrol officer school which is a 24 hour school which teaches you to identify things, plastic bags, things like that that people carry contraband in.

. . .

Q. Now, what you felt in the defendant's pocket when you patted him down, sir, was that consistent with your training, sir, as to the type of plastic bags that are used to carry controlled substances?

A. Yes, sir, it is.

Q. And when you—after you felt that in the defendant's pockets, what did you next do, sir?

A. I asked him what he had in his pocket and he started laughing a little bit and pulled out some money, said he had some money in there and he pulled that out but I could still see the long cylindrical bag he had in his pocket, his tight jeans. I then asked him what it was. He stuck his hand in his pocket and tried to palm what he had and I asked him what he was trying to hide and he rolled open his hand and showed me the white plastic bag with the white powdery substance in it.

Q. You stated you could still see the baggie. Could you see a baggie itself, sir, or did you see the bulge in the pocket?

A. You could see the long cylindrical bulge in his pocket.

After the *voir dire* hearing, the trial court entered an order denying the defendant's motion to suppress the evidence. Based upon the evidence presented, the court made the following findings of fact:

3) That Officer Johnson placed said Harold Delp under arrest for the offense of impaired driving.

4) That the above-named defendant was a passenger in the vehicle at the time it was stopped by Officer Johnson.

5) That shortly after Officer Johnson placed said Harold Delp in custody Deputy Sheriff John Gregory arrived and was requested by Officer Johnson to assist by securing the vehicle

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and searching the passenger compartment incident to the arrest of said Delp.

. . .

8) That Deputy John Gregory patted down the defendant and felt what seemed to him to be a rolled up plastic baggie in the defendant's front pants pocket.

9) That Deputy John Gregory had received numerous hours of training in the enforcement of the North Carolina Controlled Substances Act and had participated in numerous arrests for violations of said act.

10) That Deputy John Gregory was familiar with the area surrounding Awful Arthur's which was at the intersection where the vehicle had been stopped and is an area in which previous arrests have been made for controlled substances violations.

11) That Deputy Gregory had observed that the defendant appeared to exhibit the effects of having consumed some impairing substance and the effects were consistent with the use of a controlled substance such as was customarily stored in a rolled up plastic bag.

12) That Deputy Gregory asked the defendant what he had in his pocket to which the defendant replied money, and the defendant pulled some money out of his pocket.

13) That Deputy Gregory told the defendant that he could still see something in the defendant's pocket and asked the defendant to pull his pocket out.

. . .

15) That Deputy Gregory observed the defendant conceal something in the palm of his hand.

16) That Deputy Gregory asked the defendant what he had in his hand and then observed a plastic baggie containing a white powdery substance which appeared to Deputy Gregory to be cocaine.

17) That Deputy Gregory then seized the plastic baggie and placed the defendant in custody.

The trial court entered the following conclusions of law:

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- 1) That based upon Deputy Gregory's training and experience and the circumstances as they appeared a reasonable officer would be justified in believing that probable cause existed to search the defendant for the possession of controlled substances.
- 2) That exigent circumstances existed that precluded Officer Gregory from obtaining a search warrant to search the defendant.
- 3) That the defendant was legally searched when asked about the bulge in his pants pocket observed by Deputy Gregory.
- 4) That the location, time of day, physical condition of the defendant, size and shape of the bulge in the defendant's pocket, the defendant's apparent effort to conceal the contents of his pocket from Deputy Gregory's scrutiny, gave Deputy Gregory reasonable grounds to believe that the defendant possessed illegal drugs.

Defendant subsequently entered a plea of guilty to possession of a Schedule II controlled substance, for which he received a sentence of two years imprisonment, suspended, and was placed on probation for three years. Defendant appeals the denial of the motion to suppress evidence.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Anita LeVeaux Quigless, for the State.

Merrell, Tillett & Barnes, by Edgar L. Barnes and Phillip H. Hayes, Jr., for defendant-appellant.

ORR, Judge.

Even though the defendant in the case at bar has entered a plea of guilty to the charges against him, he has preserved his right of appeal pursuant to N.C. Gen. Stat. § 15A-979(b) from the denial of his motion to suppress the evidence seized as a result of the search by Officer Gregory. Defendant contends on appeal that the cocaine was found as a result of an unlawful search and seizure, thereby violating his rights under the Fourth Amendment of the United States Constitution and the Constitution of the State of North Carolina. We agree with defendant's argument and reverse the decision of the trial court.

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We note at the onset that in a review of the denial of defendant's motion to suppress, we must first determine whether there was competent evidence to support the trial court's findings of fact. If the evidence presented was competent, the findings are conclusive and binding on appeal. *State v. Fleming*, 106 N.C. App. 165, 415 S.E.2d 782 (1992). Defendant has not contested the findings or conclusions of the trial court. They are therefore conclusive and binding on this Court. *Id.* at 168, 415 S.E.2d at 784.

As defendant correctly points out, the Fourth Amendment of the United States Constitution, made applicable to the states by the Fourteenth Amendment, *Mapp v. Ohio*, 367 U.S. 643, 6 L. Ed. 2d 1081 (1961), provides the guarantee of "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures . . ." U.S. Const. amend. IV. Similarly, the Constitution of the State of North Carolina states that "[g]eneral warrants, whereby any officer or other person may be commanded to search suspected places without evidence of the act committed, or to seize any person or persons not named, whose offense is not particularly described and supported by evidence, are dangerous to liberty and shall not be granted." N.C. Const. art. I, § 20. "[A] governmental search and seizure of private property unaccompanied by prior judicial approval in the form of a warrant is *per se* unreasonable unless the search falls within a well-delineated exception to the warrant requirement involving exigent circumstances." *State v. Cooke*, 306 N.C. 132, 135, 291 S.E.2d 618, 620 (1982).

Terry v. Ohio, 392 U.S. 1, 20 L. Ed. 2d 889 (1968) created one such exception. In *Terry*, the Supreme Court held that an officer may conduct a pat-down search to determine whether the person is in fact carrying a weapon. "The purpose of this limited search is not to discover evidence of crime, but to allow the officer to pursue his investigation without fear of violence." *Adams v. Williams*, 407 U.S. 143, 145, 32 L. Ed. 2d 612, 617 (1972). If a search goes beyond the bounds justifiable in determining that the suspect is armed, then any evidence found as a result of such a search will be suppressed as "fruit of the poisonous tree." *Sibron v. New York*, 392 U.S. 40, 20 L. Ed. 2d 917 (1968). The courts of North Carolina follow these same constitutional principles. *State v. Vernon*, 45 N.C. App. 486, 263 S.E.2d 340 (1980); *State v. Wooten*, 18 N.C. App. 269, 196 S.E.2d 603, *appeal dismissed*, 283 N.C. 670,

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197 S.E.2d 879 (1973); *State v. Harris*, 95 N.C. App. 691, 384 S.E.2d 50 (1989), *aff'd*, 326 N.C. 588, 391 S.E.2d 187 (1990).

However, in *Michigan v. Long*, 463 U.S. 1032, 77 L. Ed. 2d 1201 (1983), the United States Supreme Court held that "if, while conducting a legitimate *Terry* search . . . the officer should discover contraband other than weapons, he clearly cannot be required to ignore the contraband, and the Fourth Amendment does not require its suppression in such circumstances." The courts of North Carolina have likewise consistently held that "in the conduct of the limited weapons search, contraband or evidence of a crime is of necessity exposed, the officer is not required by the Fourth Amendment to disregard such contraband or evidence of crime." *State v. Streeter*, 17 N.C. App. 48, 50, 193 S.E.2d 347, 348 (1972). Moreover, North Carolina has also extended the limits of the *Terry* pat-down and have held that "[w]hen an officer makes a lawful arrest of an occupant of an automobile and conducts a contemporaneous search of the automobile incident to that arrest, he may ask passengers to step out of the vehicle so he may complete his investigation." *State v. Adkerson*, 90 N.C. App. 333, 338, 368 S.E.2d 434, 437 (1988), quoting *State v. Collins*, 38 N.C. App. 617, 248 S.E.2d 405 (1978). "When there are reasonable grounds to order an occupant out of the car, then he may be subjected to a limited search for weapons when the facts available to the officer justify the belief that such an action is appropriate." *Id.* "The officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger." *Id.* quoting *Terry*, 392 U.S. at 27, 20 L. Ed. 2d at 909.

The above cases are justified by reference to the "plain view" doctrine, which generally allows an officer to seize evidence when the initial intrusion which brings the evidence into plain view is lawful, and it is immediately apparent to the police that the items observed constitute evidence of a crime, are contraband, or are otherwise subject to seizure. *State v. Church*, 110 N.C. App. 569, 430 S.E.2d 462 (1993); *see also Horton v. California*, 496 U.S. 128, 110 L. Ed. 2d 112 (1990).

The constitutional guarantee against unreasonable search and seizure does not apply where a search is not necessary, and where the contraband subject matter is fully disclosed to the eye and hand. *State v. Harvey*, 281 N.C. 1, 187 S.E.2d 706 (1972).

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The plain view doctrine has now been expanded by the United States Supreme Court in *Minnesota v. Dickerson*, --- U.S. ---, 124 L. Ed. 2d 334 (1993). On facts remarkably similar to the case *sub judice*, the Court held that the “[plain view] doctrine has an obvious application by analogy to cases in which an officer discovers contraband through the sense of touch during an otherwise lawful search.” *Id.* at ---, 124 L. Ed. 2d at 345.

If a police officer lawfully pats down a suspect’s outer clothing and feels an object whose contour or mass makes its identity immediately apparent, there has been no invasion of the suspect’s privacy beyond that already authorized by the officer’s search for weapons; if the object is contraband, its warrantless seizure would be justified by the same practical considerations that inhere in the plain view context.

Id. at ---, 124 L. Ed. 2d at 346. “The seizure of an item whose identity is already known occasions no further invasion of privacy.”

Id. at ---, 124 L. Ed. 2d at 347. “Thus, the dispositive question . . . is whether the officer who conducted the search was acting within the lawful bounds marked by *Terry* at the time he gained probable cause to believe that the lump in respondent’s jacket was contraband.” *Id.*

In *Dickerson*, the officer conducted a *Terry* pat-down and felt a small, hard object wrapped in plastic in the defendant’s pocket. He then formed the opinion that the object was crack cocaine, and then began “squeezing, sliding, and otherwise manipulating the contents of the defendant’s pocket—a pocket which the officer already knew contained no weapon.” *Id.* The Court stated that “[a]lthough the officer was lawfully in a position to feel the lump in respondent’s pocket, because *Terry* entitled him to place his hands on respondent’s jacket, . . . the incriminating character of the object was not *immediately apparent* to him.” *Id.* at ---, 124 L. Ed. 2d at 348 (emphasis added). The Court concluded that the continuing search to determine specifically what was in the defendant’s pocket was beyond the scope of the lawful weapons search.

Likewise in the case before us, while Officer Gregory was justified in conducting a limited pat-down of the defendant to determine whether the defendant was armed, once the officer concluded that there was no weapon, he could not continue to search or question the defendant in order to ascertain whether the plastic bag was indeed contraband. As the Supreme Court pointed out in *Dickerson*, “[w]here, as here, ‘an officer who is executing a valid

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search for one item seizes a different item,' this Court rightly 'has been sensitive to the danger . . . that officers will enlarge a specific authorization, furnished by a warrant or an exigency, into the equivalent of a general warrant to rummage and seize at will.' " *Id.* at ---, 124 L. Ed. 2d at 347, quoting *Texas v. Brown*, 460 U.S. 730, 75 L. Ed. 2d 502 (1983).

Officer Gregory's testimony indicates that he did not know that the bag contained contraband until he asked the defendant to turn out his pockets and show him the contents in his hands. He knew only that there was a cylindrical bulge in the pocket of the defendant's jeans, and that the bulge felt like a plastic baggie. He could not see any of the bag, but could only feel the contours through the defendant's clothing as a result of the pat-down. "[T]he officer's continued exploration of respondent's pocket after having concluded that it contained no weapon was unrelated to the sole justification for the search [under *Terry*] . . . the protection of the police officer and others nearby. It therefore amounted to the sort of evidentiary search that *Terry* expressly refused to authorize." *Id.* While the pat-down revealed that the defendant had a plastic baggie in his pocket, the officer's testimony at *voir dire* indicated that it was not *immediately apparent* to him that the baggie held contraband. Without some other exigency to justify the continued warrantless search of the defendant, he was no longer authorized under *Terry* and its progeny to invade the defendant's privacy.

We therefore hold that the cocaine seized from the defendant in this case was the fruit of a constitutionally impermissible search. Because the search for and the seizure of such evidence violated the defendant's Fourth Amendment rights, it should not have been admitted in any subsequent trial against him. For the reasons stated, the judgment below is vacated.

Vacated.

Judge WELLS concurs.

Judge McCRODDEN dissents in a separate opinion.

Judge McCRODDEN dissenting.

I respectfully dissent from the majority's conclusion that the trial court erred in denying defendant's motion to suppress evidence

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of the cocaine seized from defendant because it was the fruit of a constitutionally impermissible search in light of *Minnesota v. Dickerson*, --- U.S. ---, 124 L.Ed.2d 334 (1993). In my opinion, *Dickerson* is not dispositive of the question raised by defendant's appeal.

The majority opinion concludes that Deputy Sheriff John Gregory's actions in questioning what defendant had in his pockets and in asking him to "rabbit-ear" them violated the Fourth Amendment of the United States Constitution. The majority bases this conclusion on a misapprehension of and, therefore, an erroneous reliance on, *Dickerson*, leading it to conclude that, because it was not immediately apparent to Deputy Gregory that the item in defendant's pocket was contraband, the deputy was not justified in continuing a warrantless search, to wit, questioning defendant and requesting that defendant "rabbit-ear" his pockets. This reliance is wrong because the questioning of defendant following the pat down search was *not* a search and hence not prohibited by the Fourth Amendment.

A close examination of the facts reveals several key differences between *Dickerson* and the case at hand. In both *Dickerson* and the instant case, law enforcement officers stopped suspects and performed protective pat down searches which failed to reveal any weapons. The officer in *Dickerson* testified that during the pat down search he felt a lump in the defendant's pocket, and the deputy in the case at hand testified that he "felt what appeared to be a plastic baggie in [defendant's] left front pant's pocket." At this point in the proceeding, however, the officer in *Dickerson* took a course clearly distinguishable from the one the deputy took in this case. In *Dickerson*, the officer determined that the lump in the defendant's pocket was contraband only after he "squeezed, slid, and otherwise manipulated the pocket's contents" during the pat down. *Id.* at ---, 124 L.Ed.2d at 340. After feeling the lump in *Dickerson*'s pocket, the officer reached into it and pulled out a bag of cocaine. The manipulation of the defendant's pockets is what the United States Supreme Court found objectionable in *Dickerson*, when it stated that the police officer "overstepped the bounds of the 'strictly circumscribed' search for weapons allowed under *Terry*." *Id.* at ---, 124 L.Ed.2d at 347 (quoting *Terry v. Ohio*, 392 U.S. 1, 26, 20 L.Ed.2d 889, 908 (1968)).

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In the case before us, there is no evidence that Deputy Gregory manipulated the defendant's pockets or continued a physical invasion of defendant's privacy, actions that would have amounted to overstepping the bounds of *Terry*. To the contrary, after frisking the defendant for weapons and feeling what appeared to be a plastic baggie in his pocket, the deputy terminated the *Terry* search. *Dickerson*, which refined *Terry*, simply is not an issue here.

In my view, the decisive question of this appeal is whether Deputy Gregory's actions subsequent to the pat down constituted a search. If no search is necessary or conducted, the constitutional guaranty of the Fourth Amendment is not applicable. *State v. Kinley*, 270 N.C. 296, 297, 154 S.E.2d 95, 96 (1967). A search implies both an examination of one's premises or person with a view to the discovery of contraband, and an exploratory investigation or quest. *State v. Reams*, 277 N.C. 391, 400, 178 S.E.2d 65, 70 (1970), cert. denied, 404 U.S. 840, 30 L.Ed.2d 74 (1971) (quoting *Haerr v. United States*, 240 F.2d 533, 535 (5th Cir. 1957)). When evidence is delivered to a police officer upon request and without compulsion or coercion, there is no search within the constitutional prohibition against unreasonable searches and seizures. See *State v. Reams*, 277 N.C. at 396, 198 S.E.2d at 68 and cases cited therein. From the facts of this case, it is apparent that no additional search was conducted after the pat down.

Deputy Gregory testified:

I asked [defendant] what he had in his pocket. [Defendant] said money and pulled out some money. . . . I told him that I could still see something in his jeans, they were tight to his body. I asked him to pull his pockets rabbit-ear out, he did. I noticed at that point that he was about—that he was about to start laughing. I then noticed he was palming something in his hand. I asked him what was in his hand. He turned it over. I saw a plastic bag with a small amount of white powder on it. The powder looked to be cocaine.

(Emphasis added). There is nothing in the record to dispute Deputy Gregory's testimony that, in response to his asking defendant what was in his pocket and requesting that he "rabbit-ear" his pockets, defendant voluntarily exhibited the package of cocaine. The record is devoid of any evidence that the deputy coerced the defendant into revealing the cocaine. See *Reams*, 277 N.C. at 400, 178 S.E.2d at 70. On the contrary, there was evidence that the

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process by which defendant displayed the cocaine was free of coercion, intimidation, and force.

Moreover, defendant's intoxication did not negate the element of voluntariness when he exposed the cocaine to the officer. This Court, in *State v. Colson*, 1 N.C. App. 339, 343, 161 S.E.2d 637, 640 (1968), stated that "drunkenness provides the drinker with no constitutional cloak of privacy not available to his sober brothers." Nothing in the record indicates that the defendant's intoxication caused him to be incapable of voluntary and intelligent action.

Finally, I would point out that defendant could have exercised his constitutional right to refuse the deputy's request that he "rabbit-ear" his pockets and show him the contraband. Under constitutional scrutiny, such refusal would not have given the deputy probable cause either to search or arrest the defendant. *Cf. Florida v. Bostick*, 501 U.S. ---, ---, 115 L.Ed.2d 389, 398-90 (1991) (a suspect's refusal to cooperate, without more, does not furnish the minimal level of objective justification needed for a detention or seizure). The facts in the case at hand, however, provide no indication that the defendant felt that he could not refuse to display the cocaine or that he would have been arrested if he refused to do so.

I realize that my conclusion, that what transpired between Deputy Gregory and the defendant after the pat down was not a search, is contrary to the reasoning of the trial court. Even though I reject the trial court's analysis, I believe that it reached the correct result in this case and that the result should be affirmed. Defendant's attack on the legality of the search has required us to review the record to determine whether the search was lawful. In so doing, we may review the trial court's order for errors of law pertaining to the issue. *Cf. State v. Kirby*, 276 N.C. 123, 171 S.E.2d 416 (1970) (defendant's exception to the judgment presents the face of the record for review). If the trial court reached the correct result, *i.e.*, denial of defendant's motion to suppress, the ruling will not be disturbed even though the court may not have assigned the right reason for the order entered. *State v. Austin*, 320 N.C. 276, 290, 357 S.E.2d 641, 650, *cert. denied*, 484 U.S. 916, 98 L.Ed.2d 224 (1987).

In conclusion, because defendant voluntarily showed the cocaine to Deputy Gregory, I vote to uphold the denial of defendant's motion to suppress and to affirm the judgment.

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SPURGEON FOSTER, JR. v. FOSTER FARMS, INC., AND JERRY FOSTER

No. 9222SC1034

(Filed 7 December 1993)

1. Corporations § 214 (NCI4th)— judicial dissolution—director deadlock—evidence sufficient

The trial court did not abuse its discretion by finding, when sitting without a jury, that the directors of a corporation were deadlocked and that grounds for dissolution of the corporation existed under N.C.G.S. § 55-14-30(2)(i) where there were two stockholders who were also the two directors of a farming business; the stockholders and directors were brothers; the corporation had two main areas of operation, grain and hogs, each run by one brother; plaintiff testified that he believes that the corporation should borrow money to prepay certain operating expenses, buy and resell equipment, and participate in the futures market; defendant testified that he believes that the corporation should borrow money only as a last resort; the corporation's bylaws state that no loans may be contracted on the corporation's behalf unless authorized by a resolution of the board of directors; because plaintiff and defendant are the only directors and they cannot agree on when the corporation should borrow money, the corporation cannot borrow money at all; and plaintiff borrowed money in his own name on three occasions and used the borrowed money to benefit the grain side of the business. While the corporation is profitable, pays its bills on time, and conducts its everyday operations without incident, there was other competent evidence to support the finding that the corporation's business could not be conducted to the advantage of the shareholders generally in that both the corporation and defendant enjoyed the benefits of plaintiff's borrowing strategies while avoiding the attendant risks.

Am Jur 2d, Corporations §§ 2758 et seq.**2. Corporations § 214 (NCI4th)— judicial dissolution—protection of plaintiff's rights or interests—findings not sufficient**

The trial court, sitting without a jury, made insufficient findings to support its conclusion that a corporate dissolution was reasonably necessary to protect plaintiff's rights or in-

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terests where the court simply found that "liquidation is reasonably necessary for the protection of the interests of the complaining shareholder" and failed to make any of the findings required under *Meiselman v. Meiselman*, 309 N.C. 279. N.C.G.S. § 55-14-30(2)(ii).

Am Jur 2d, Corporations §§ 2758 et seq.**3. Corporations § 214 (NCI4th) — judicial dissolution — deadlocked shareholders — evidence sufficient**

There was sufficient evidence for the trial court to find grounds for dissolving a corporation under N.C.G.S. § 55-14-30(2)(iii) because the shareholders were deadlocked and have failed for two years to elect successor directors for those whose terms have expired where plaintiff testified that they had not had formal corporate board of directors meetings since the inception of the corporation in 1981 and defendant testified that there had been one such meeting several years back, but he could not remember exactly what year that was. This evidence is sufficient to support the trial court's finding that the shareholders are deadlocked and have failed to elect directors over a two year period; when the only two shareholders of a corporation also comprise its board of directors and the two shareholders/directors hold conflicting philosophies on how to operate and manage the business, there is no need to show that formal board of directors meetings were held to attempt to elect new directors.

Am Jur 2d, Corporations §§ 2758 et seq.**4. Corporations § 214 (NCI4th) — judicial dissolution — exercise of discretion**

The trial court did not abuse its discretion by ordering a corporate dissolution, even though dissolution would create a significant tax liability for the parties, where it was clear from the court's comments that the trial court carefully weighed the consequences of each course of action it was authorized to take before deciding to liquidate the corporation.

Am Jur 2d, Corporations §§ 2758 et seq.**5. Corporations § 213 (NCI4th) — judicial dissolution — buy-out rights not allowed — no error**

The trial court did not err in refusing to allow defendant corporation to exercise its mandatory buy-out rights under

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N.C.G.S. § 55-14-31(d) after determining that dissolution would be appropriate. That statute applies only to dissolutions granted under N.C.G.S. § 55-14-30(2)(ii) and those grounds for dissolution did not exist here.

Am Jur 2d, Corporations §§ 2737 et seq.**6. Corporations § 213 (NCI4th)— judicial dissolution— valuation hearing— not required**

The trial court did not err by not holding a hearing on the valuation of defendant corporation's stock and assets after ordering dissolution of the corporation as allegedly contemplated in a pretrial order where the pretrial order stipulated that the only issue to be decided was whether the corporation should be dissolved and does not require that a subsequent valuation hearing be held. The court must direct the winding up and liquidation of the corporation's business and affairs when it enters a decree of dissolution; specific problems regarding implementation of the dissolution order, including valuation of assets, can be brought to the attention of the trial court by motion as the problems arise.

Am Jur 2d, Corporations §§ 2737 et seq.

Appeal by defendants from judgment entered 20 March 1992, *nunc pro tunc* 10 February 1992 by Judge William Z. Wood, Jr. in Davie County Superior Court. Heard in the Court of Appeals 29 September 1993.

Foster Farms is a profitable farming business with net assets of over \$1,000,000 and retained earnings of \$318,257. It was incorporated in 1981 by two brothers, Spurgeon and Jerry Foster. They are the only shareholders in the corporation and each owns 50% of the stock. Foster Farms' two main areas of operation are grain and hogs. Plaintiff runs the grain operation and defendant Foster runs the hog operation.

Over time, the brothers have developed different philosophies on how to run the corporation. Plaintiff believes that the corporation should borrow money to participate in the futures market, to cover operating expenses, and to take advantage of various business opportunities. Defendant, however, believes that the corporation should borrow money only as a last resort and will not allow plaintiff to borrow money in the corporation's name. In March

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1991, plaintiff filed this action for judicial dissolution under G.S. 55-14-30.

On 20 March 1993, after a bench trial, the trial court entered a judgment ordering dissolution and liquidation of the corporation. The relevant parts of the trial court's judgment are as follows:

FINDINGS OF FACT

. . . .

5. That the Board of Directors of the corporation or those in control of the corporation are deadlocked in the management of the corporate affairs and the shareholders are unable to break the deadlock.

6. That irreparable injury to the corporation is being threatened because of the inability of the corporation to borrow money to meet its operating expenses due to the deadlock in the management of the corporation.

7. That the business and affairs of the corporation can no longer be conducted to the advantage of the shareholders generally because of the deadlock.

8. That liquidation is reasonably necessary for the protection of the interest of the complaining shareholder.

9. That the shareholders are deadlocked in voting power and have failed, for a period that includes two consecutive annual meeting dates, to elect successors to directors whose terms have expired.

10. That if the Court denies the request for liquidation, irreparable injury is likely to occur to the corporation due to the deadlock between the shareholders and directors of those in control of the corporation concerning the operation of the business and affairs of the corporation.

11. That grounds exist pursuant to North Carolina General Statute 55-14-30 for the Court to dissolve the corporation.

BASED UPON THE FOREGOING FINDINGS OF FACT, THE COURT MAKES THE FOLLOWING:

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CONCLUSIONS OF LAW

. . . .

2. That the Board of Directors of the corporation or those in control of the corporation are deadlocked in the management of the corporate affairs and the shareholders are unable to break the deadlock.

3. That irreparable injury to the corporation is being threatened because of the inability of the corporation to borrow money to meet its operating expenses due to the deadlock in the management of the corporation.

4. That the business and affairs of the corporation can no longer be conducted to the advantage of the shareholders generally because of the deadlock.

5. That liquidation is reasonably necessary for the protection of the rights and interests of the complaining shareholders and of the rights and interest of the shareholders generally of the corporation.

6. That the shareholders are deadlocked in voting power and have failed for a period that includes two consecutive annual meeting dates, to [elect] successors to directors whose terms have expired.

7. That if the Court denies the request for liquidation, irreparable injury is likely to occur to the corporation due to the deadlock between the shareholders and directors of those in control of the corporation concerning the operation of the business and affairs of the corporation.

8. That grounds exist pursuant to North Carolina General Statute 55-14-30 for the Court to dissolve the corporation.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED THAT:

1) Judgment be entered in favor of plaintiff and that a decree dissolving the corporation be entered in this matter with the effective date of February 13, 1992.

2) The Clerk of Superior Court of Davie County is hereby ordered to deliver a certified copy of this decree to the Secretary of State for filing; and

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3) The corporation is to be liquidated pursuant to the terms of the North Carolina General Statute 55-14-05 and North Carolina General Statute 55-14-06 and 55-14-07.

Defendants appeal.

White and Crumpler, by Dudley A. Witt and Teresa L. Hier, for plaintiff-appellee.

Robinson, Bradshaw & Hinson, P.A., by D. Blaine Sanders, for defendant-appellant Foster Farms, Inc.

William E. West, Jr., for defendant-appellant Jerry Foster.

EAGLES, Judge.

Defendants appeal from the trial court's 20 March 1992 judgment ordering the dissolution and liquidation of defendant corporation under G.S. 55-14-30(2). Defendants' ten assignments of error can be grouped into four main contentions. Defendants contend that: (1) grounds for dissolution under G.S. 55-14-30 do not exist here; (2) if grounds for dissolution exist under G.S. 55-14-30, the trial court abused its discretion in ordering the dissolution of defendant corporation; (3) the trial court erred in refusing to allow defendant corporation to exercise its mandatory buy-out rights under G.S. 55-14-31(d); and (4) the trial court erred in refusing to hold a hearing on the valuation of defendant corporation's assets and stock. After careful review, we conclude that grounds for judicial dissolution of Foster Farms, Inc. exist under G.S. 55-14-30(2)(i) & (iii), but that the trial court erred in concluding that grounds for dissolution under G.S. 55-14-30(2)(ii) have been established. We also conclude that the mandatory buy-out provision of G.S. 55-14-31(d) does not apply to judicial dissolutions granted under G.S. 55-14-30(2)(i) or (iii).

We note at the outset that this is the first case requiring us to apply the judicial dissolution provisions of the "new" 1990 North Carolina Business Corporation Act. 1989 N.C. Sess. Laws ch. 265, § 1. We also note that we are dealing with a close corporation in which there are only two shareholders who each own 50% of the stock.

I.

[1] Defendants first contend that the trial court abused its discretion in ordering the dissolution of defendant corporation under

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G.S. 55-14-30. G.S. 55-14-30(2) provides that a trial court may dissolve a corporation in a proceeding by a shareholder if it finds that:

(i) the directors or those in control of the corporation are deadlocked in the management of the corporate affairs, the shareholders are unable to break the deadlock, and irreparable injury to the corporation is threatened or being suffered, or the business and affairs of the corporation can no longer be conducted to the advantage of the shareholders generally, because of the deadlock; (ii) liquidation is reasonably necessary for the protection of the rights or interests of the complaining shareholder; (iii) the shareholders are deadlocked in voting power and have failed, for a period that includes at least two consecutive annual meeting dates, to elect successors to directors whose terms have expired. . . .

The decision whether to grant dissolution is within the trial court's discretion even though grounds for dissolution are found to exist under the statute. G.S. 55-14-30 Official Comment; Russell M. Robinson, II, *Robinson on North Carolina Corporation Law* § 28.10 at 473 (1990). Here, the trial court concluded that grounds for dissolution existed under each of these three subdivisions and then ordered dissolution. Defendants contend that there is insufficient evidence to support a finding that grounds existed under any of these subdivisions. We disagree. We hold that grounds for judicial dissolution exist under G.S. 55-14-30(2)(i) and (iii), but not under G.S. 55-14-30(2)(ii).

A.

Dissolution may be ordered under G.S. 55-14-30(2)(i) if 1) there is a deadlock among the directors in the management of the corporation; 2) the shareholders are unable to break the deadlock; and 3) the corporation is suffering or in danger of suffering irreparable injury, or is no longer able to conduct its business to the advantage of the shareholders generally. For dissolution to be an available remedy under G.S. 55-14-30(2)(i), all three conditions must be met. Defendants argue that the first and third conditions have not been met. We disagree.

Since the parties agreed to a bench trial, the trial court's findings of fact have the weight of a jury verdict and are conclusive on appeal if supported by competent evidence. This is true even though the evidence might also sustain findings to the contrary.

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Williams v. Pilot Life Insurance Co., 288 N.C. 338, 342, 218 S.E.2d 368, 371 (1975). Here, there is sufficient competent evidence to support the trial court's finding of deadlock. Plaintiff testified that he believes that the corporation should borrow money to prepay certain operating expenses, buy and resell equipment, and participate in the futures market. Defendant testified that he believes that the corporation should borrow money only as a last resort. The corporation's bylaws state that no loans may be contracted on the corporation's behalf unless authorized by a resolution of the board of directors. Plaintiff and defendant are the only directors, and since they cannot agree when the corporation should borrow money, the corporation cannot borrow money at all. Plaintiff testified that on at least three previous occasions when defendant would not allow plaintiff to borrow money in the corporation's name, he borrowed money in his own name and used the borrowed money to benefit the grain side of the business. Defendants argue that this evidence does not show deadlock in the management of the corporation's affairs but only shows disagreement and miscommunication. However, deciding when, if, and how the corporation should borrow money is a major management decision and the parties are clearly deadlocked on this issue. Accordingly, we conclude that there is sufficient evidence to support a finding of deadlock in the management of the corporation's affairs.

A finding of director deadlock is not grounds for dissolution under G.S. 55-14-30(2)(i) unless there is also a finding either that irreparable injury is being threatened or suffered by the corporation, or that its business and affairs can no longer be conducted to the advantage of the shareholders generally. G.S. 55-14-30(2) Official Comment 2a; *Ellis v. Civic Improvement, Inc.*, 24 N.C. App. 42, 47, 209 S.E.2d 873, 876 (1974). The only North Carolina case determining whether the affairs of the corporation can be conducted to the advantage of the shareholders is *Ellis v. Civic Improvement, Inc.*, *supra*.

In *Ellis*, the plaintiff sued for liquidation under former G.S. 55-125(a)(1), which allowed dissolution if "the directors are deadlocked in the management of the corporate affairs and the shareholders are unable to break the deadlock, so that the business can no longer be conducted to the advantage of all the shareholders." Plaintiff and defendant were the only two shareholders in the corporation, and the board of directors consisted of plaintiff, defendant, and both their wives. Plaintiff alleged that when the corporation

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was formed, he and defendant were to use the corporation's building to carry on their profession. Plaintiff, a dentist, rented 600 square feet and paid \$180 per month as rent. Defendant, a medical doctor, rented 1200 square feet and paid \$360 per month. When plaintiff left two years later to practice in Chapel Hill, defendant took control of the corporation and paid the same \$360 per month to rent the whole building. Plaintiff could not change this policy because he and defendant were deadlocked in voting power. This Court upheld the trial court's order of liquidation under former G.S. 55-125(a)(1) stating that "[I]f [defendant] continues to set his own rent for the entire building at the same amount he was paying in 1968 for two-thirds of the space, the corporation cannot be operated to the advantage of all the stockholders." *Id.* at 47, 209 S.E.2d at 876. Accordingly, we hold that in order to show that the business and affairs of the corporation can no longer be conducted to the advantage of the shareholders generally under G.S. 55-14-30(2)(i), there must be some showing that the business is being conducted to the unfair advantage of one shareholder or group of shareholders, or that a shareholder or group of shareholders is benefitting at the expense of the others.

Defendants argue that the corporation's business is being conducted to the advantage of the shareholders because the corporation is profitable, pays its bills on time, and conducts its everyday operations without incident. While these are factors to be considered, there was other competent evidence to support the trial court's finding that the corporation's business could not be conducted to the advantage of the shareholders generally. The trial court's findings of fact are conclusive on appeal if supported by competent evidence. *Williams v. Pilot Life Insurance Co.*, 288 N.C. 338, 342, 218 S.E.2d 368, 371 (1975). The evidence shows that plaintiff and defendant are the only two shareholders in the corporation, and that it is plaintiff's responsibility to run the grain operation. Plaintiff's income comes entirely from the profits of the grain operation and fluctuates accordingly. Plaintiff testified that he cannot successfully run the grain operation without borrowing money to take advantage of certain business opportunities. Since he and defendant were deadlocked on when to borrow money, plaintiff borrowed money on three prior occasions in his own name and at his own risk for the benefit of the corporation. Although defendant did not approve of plaintiff's borrowing strategies, he indirectly benefitted from the success of those strategies when plaintiff used

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those funds for the corporation. In sum, both the corporation and defendant enjoyed the benefits of plaintiff's borrowing strategies while avoiding the attendant risks. Defendant is benefitting at the expense of plaintiff because plaintiff is assuming all the risks associated with borrowing money, while defendant and the corporation are sharing only the benefits. Accordingly, there is sufficient evidence to support the trial court's finding that the business affairs of the corporation can no longer be conducted to the advantage of the shareholders generally. Accordingly, we agree with the trial court that grounds for dissolution exist under G.S. 55-14-30(2)(i).

B.

[2] The trial court also found that liquidation was reasonably necessary for the protection of the plaintiff's rights or interests. G.S. 55-14-30(2)(ii). G.S. 55-14-30(2)(ii) is identical to former G.S. 55-125(a)(4). The North Carolina Supreme Court discussed G.S. 55-125(a)(4) extensively in *Meiselman v. Meiselman*, 309 N.C. 279, 307 S.E.2d 551 (1983). In *Meiselman, supra*, the Court set out the analysis a trial court should follow in determining whether to order dissolution under former G.S. 55-125(a)(4). The Court held that a trial court must first define the "rights or interests" the complaining shareholder has in the corporation. It must then determine whether some form of relief is reasonably necessary to protect those rights and interests. *Id.* at 301, 307 S.E.2d at 563. The Court broadly defined "rights or interests" in a close corporation to include the complaining shareholder's "reasonable expectations" in the corporation. These "reasonable expectations" are to be determined by examining the entire history of the participants' relationship, including the "reasonable expectations" created at the inception of the relationship and as they have been altered over time. *Id.* at 298, 307 S.E.2d at 563. The Court held that in order for the complaining shareholder to succeed under the "reasonable expectations" analysis, he must prove that:

- (1) he had one or more substantial reasonable expectations known or assumed by the other participants; (2) the expectation has been frustrated; (3) the frustration was without fault of plaintiff and was in large part beyond his control; and (4) under all of the circumstances of the case, plaintiff is entitled to some form of equitable relief.

Id. at 301, 307 S.E.2d at 564. See also, *Lowder v. All Star Mills, Inc.*, 75 N.C. App. 233, 330 S.E.2d 649 (1985) (affirming the trial

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court's order of dissolution after applying the analysis of *Meiselman* to the trial court's findings of fact).

We note that *Meiselman* is factually different from the instant case because the two brothers in *Meiselman* owned unequal shares of stock. The plaintiff in *Meiselman* was a minority shareholder who owned only 29.82% of the total shares of the family corporation. Although plaintiff here is not a minority shareholder, the guiding principles of *Meiselman* apply. The trial court here failed to make any of the findings required under *Meiselman*. The trial court simply found that "liquidation is reasonably necessary for the protection of the interests of the complaining shareholder." Accordingly, we hold that the trial court's findings of fact are not sufficient to support its conclusion that grounds for dissolution exist under G.S. 55-14-30(2)(ii).

C.

[3] The trial court also found that grounds for dissolution existed under G.S. 55-14-30(2)(iii). G.S. 55-14-30(2)(iii) provides that dissolution may be ordered if "the shareholders are deadlocked in voting power and have failed, for a period that includes at least two consecutive annual meeting dates, to elect successors to directors whose terms have expired." G.S. 55-14-30(2)(iii). Dissolution under subdivision (iii) is not dependent on a finding of irreparable injury or misconduct by the directors. G.S. 55-14-30(2)(iii) Official Comment 2a. This remedy is said to be particularly important in small family-held corporations where share ownership may be divided on a 50-50 basis. *Id.*

There is sufficient competent evidence here to support the trial court's finding of shareholder deadlock. Plaintiff testified that they had not had formal corporate board of directors meetings since the inception of the corporation in 1981. Defendant testified that there had been one such meeting several years back, but he could not remember exactly what year that was. This evidence is sufficient to support the trial court's finding that the shareholders are deadlocked and have failed to elect directors over a two year period. G.S. 55-14-30(2)(iii) does not require that any meetings actually be held or be attempted. Apparently, the inability of the shareholders to break the deadlock and elect directors may be shown in any manner. Russell M. Robinson, II, *Robinson on North Carolina Corporation Law* § 28.10 at 475 (1990). When the only two shareholders of a corporation also comprise its board of direc-

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tors and the two shareholders/directors hold conflicting philosophies on how to operate and manage the business, there is no need to show for purposes of G.S. 55-14-30(2)(iii) that formal board of directors meetings were held to attempt to elect new directors. Accordingly, we agree with the trial court that grounds for dissolution exist under G.S. 55-14-30(2)(iii).

D.

[4] Defendants contend that even if the trial court was correct that grounds for dissolution exist, the trial court abused its discretion in ordering dissolution on this record. We disagree. Once grounds for dissolution have been established under the statute, the trial court must "exercise its equitable discretion, and consider the actual benefit and injury to [all of] the shareholders resulting from dissolution." *Meiselman v. Meiselman*, 309 N.C. 279, 297, 307 S.E.2d 551, 562 (1983). Defendants argue that dissolution is inappropriate because it will create significant tax liability for both parties. Defendants also argue that the corporation is a profitable family business that should not be dissolved. The trial court considered these arguments but in its oral ruling from the bench stated:

But, gentlemen, the choices I have is to leave them together fighting each other, which is not going to work, or to allow the dissolution and maybe they can cut their losses and go on and rebuild at this time. That's the only choices I see. It's probably better to do that. . . . But I will rule if I leave them together and deny the motion to liquidate, they will fight each other and destroy the corporation, which is in the long run and may be worse because they will have stress on their families and more court proceedings. . . .

It is clear from these comments from the bench that the trial court carefully weighed the consequences of each course of action it was authorized to take before deciding to liquidate the corporation. Accordingly, we conclude that there is no abuse of discretion.

II.

[5] Defendants also contend that the trial court erred in refusing to allow defendant corporation to exercise its mandatory buy-out rights under G.S. 55-14-31(d). G.S. 55-14-31(d) provides that:

In any proceeding brought by a shareholder under G.S. 55-14-30(2)(ii) in which the court determines that dissolution

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would be appropriate, the court shall not order dissolution if, after such determination, the corporation elects to purchase the shares of the complaining shareholder at their fair value, as determined in accordance with such procedures as the court may provide.

G.S. 55-14-31(d) applies only to dissolutions granted under G.S. 55-14-30(2)(ii). *See also*, G.S. 55-14-31(d) North Carolina Commentary. Since we have held that grounds for dissolution do not exist under G.S. 55-14-30(2)(ii), we accordingly hold that the trial court was correct in concluding that defendant corporation is not entitled to buy out plaintiff's shares under G.S. 55-14-31(d).

III.

[6] Finally, defendants contend that the trial court erred in not holding a hearing on the valuation of defendant corporation's stock and assets as contemplated in the trial court's pretrial order. Defendants argue that the parties stipulated in the pretrial order that the only issue to be decided was whether the corporation should be dissolved. Accordingly, defendants contend that the pretrial order was the law of the case, and that the trial court was required to hold a valuation hearing. We are not persuaded.

The pretrial order does not require that a subsequent valuation hearing be held. It does stipulate that the only issue to be decided is whether the corporation should be dissolved. G.S. 15-14-33(a) provides that once the trial court determines that grounds for dissolution exist under G.S. 55-14-30, it may enter a decree of dissolution. When the court enters a decree of dissolution, it must then direct the winding up and liquidation of the corporation's business and affairs in accordance with G.S. 55-14-05, G.S. 55-14-06, and G.S. 55-14-07. G.S. 55-14-33(b). This is precisely what the trial court did here. The trial court was not required to hold a hearing on the valuation of the corporation's stocks and assets prior to entering its dissolution order. Any specific problems regarding implementation of the dissolution order, including valuation of the corporation's assets, can be brought to the attention of the trial court by motion as the problems arise. This assignment of error is overruled.

For the reasons stated above, the judgment of the trial court is affirmed.

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Affirmed.

Judges ORR and GREENE concur.

ASHEVILLE INDUSTRIES, INC., A NORTH CAROLINA CORPORATION, JERRY CHANDLER AND WIFE, ROBIN CHANDLER, EATON CORPORATION, AN OHIO CORPORATION, WILLIAM CLOUD HICKLIN, JESSIE R. LAW, JR., FRANCIS L. MATTOS AND WIFE, FLOY E. MATTOS, PHILIPS CONSUMER ELECTRONICS COMPANY, A DIVISION OF NORTH AMERICAN PHILIPS, A DELAWARE CORPORATION, HAYWOOD PLOTT AND WIFE, RUTH PLOTT, ALBERT SHINGLES AND WIFE, VIRGINIA SHINGLES, JOSEPH C. SWICEGOOD AND WIFE, DOROTHY C. SWICEGOOD, TENNESSEE GAS PIPELINE COMPANY, A DELAWARE CORPORATION, WEST CONTROLS, INC., A DELAWARE CORPORATION, GRACE WEST, WESTINGHOUSE ELECTRIC CORPORATION, A PENNSYLVANIA CORPORATION, A. B. WEXLER AND WIFE, PHYLLIS WEXLER, WILLA M. WITHERSPOON, PETITIONERS v. CITY OF ASHEVILLE, A MUNICIPAL CORPORATION, RESPONDENT

No. 9228SC569

(Filed 7 December 1993)

1. Municipal Corporations § 45 (NCI4th)— annexation proceeding—initiation by resolution of intent

A resolution of intent and not a resolution of consideration initiates an annexation proceeding pursuant to N.C.G.S. § 160A-48.

Am Jur 2d, Municipal Corporations, Counties, and Other Political Subdivisions §§ 70 et seq.

2. Municipal Corporations §§ 72, 74 (NCI4th)— annexation—area not separate lots—insignificant industrial use

The trial court erred in finding that a certain area to be annexed consisted of twenty separate lots and that part of the area was properly identified as industrial in use, since the evidence tended to show that the lots all belonged to one person who had lived on the property since 1930; there were no improvements to the property except the owner's house, barn, and an outbuilding; there were no conveyances of lots; only one road had been built since the owner acquired the land in 1930; the property therefore could not properly be counted as subdivided and used for residential purposes;

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the only industrial development on the land was a .79-acre easement which carried 230,000 volt high tension lines supported by steel towers; and this industrial use was insignificant compared to the nonindustrial use of the entire 36.22-acre tract.

Am Jur 2d, Municipal Corporations, Counties, and Other Political Subdivisions §§ 66 et seq.**3. Municipal Corporations §§ 59, 68 (NCI4th)—annexation—failure to meet subdivision requirement—margin of error exceeded**

An area sought to be annexed by the City of Asheville failed to meet the 60% minimum required under the subdivision test of N.C.G.S. § 160A-48(c)(3), since only 56.41% of the land was comprised of lots and tracts five acres or less in size; furthermore, the difference between that figure and the City's original figure of 64% exceeded the statutorily permissible five percent margin of error.

Am Jur 2d, Municipal Corporations, Counties, and Other Political Subdivisions §§ 66 et seq.

Appeal by petitioners from judgment entered 9 January 1992 by Judge Shirley L. Fulton in Buncombe County Superior Court. Heard in the Court of Appeals 29 April 1993.

This is an appeal brought pursuant to North Carolina General Statutes § 160A-50 (1987) for judicial review of an ordinance of the City of Asheville to annex into its corporate limits an area south of the City.

Adams, Hendon, Carson, Crow & Saenger, P. A., by S. Jerome Crow and Martin Reidinger, for petitioners-appellants.

Nesbitt & Slawter, by William F. Slawter, for respondent-appellee.

Assistant City Attorney Sarah Patterson Brison for respondent-appellee.

JOHNSON, Judge.

The facts pertinent to this appeal are as follows: The City Council of Asheville identified an area south of the corporate limits of the City of Asheville for annexation by adopting a resolution considering the proposed area on 2 June 1987. The property under

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consideration became adjacent or contiguous to the City's boundary on 31 August 1988. On 28 February 1989, the City Council adopted a resolution which stated the intent of the City of Asheville to consider the proposed area. On 14 March 1989, the City Council adopted a resolution which approved the report setting forth plans to provide services to the annexation area. The public hearing on this annexation was held on 18 April 1989.

An annexation ordinance was adopted on a first reading on 2 May 1989 and on a second reading on 9 May 1989. The annexation ordinance incorporated specific findings of the City that the annexation area met the subdivision test of North Carolina General Statutes § 160A-48(c)(3)(1987). On 16 May 1989, the City Council amended the report of plans for extension of municipal services into the annexation area by adoption of a resolution which annexed the proposed area. The annexation ordinance established an effective date of 30 June 1989. The effective date was stayed by the filing of a petition on 13 June 1989.

The matter came on for hearing before Judge Shirley L. Fulton on 27 November 1989 in Buncombe County Superior Court. Based upon the evidence presented at trial, the trial court affirmed City Ordinance 1761. The trial court held that the City had substantially complied with the statutory requirements of North Carolina General Statutes § 160A (1987) in the City's annexation procedures. Petitioners appeal from this judgment.

Petitioners' First Assignment of Error

[1] Petitioners contend with their first assignment of error that the trial court committed reversible error by finding and concluding that the annexation area met the requirements of North Carolina General Statutes § 160A-48(b)(1) (1987). We disagree.

Specifically, petitioners contend the annexation process was invalid because the annexed area was not contiguous when the annexation process was begun. Petitioners contend the annexation process was initiated by the resolution of consideration which was adopted on 2 June 1987 and that the annexation area did not qualify for annexation on 2 June 1987 because it was not contiguous at that time. However, respondent contends the annexation proceeding was initiated by the resolution of intent which was adopted on 16 February 1989 and that the annexation area was contiguous on 16 June 1989 thereby qualifying the property for annexation.

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Therefore, we must determine whether the annexation proceeding is initiated by the resolution of consideration or the resolution of intent.

North Carolina General Statutes § 160A-48(b)(1) (1987) states in pertinent part that "to qualify for annexation the total area to be annexed must be adjacent or contiguous to the municipality's boundaries at the time the annexation proceeding is begun." The procedure to initiate an involuntary annexation proceeding is detailed in North Carolina General Statutes § 160A-49 (1987). This statute mandates that the municipal governing body must either provide that: (1) a resolution of consideration is adopted and then a resolution of intent is adopted with the requirement that the resolution of intent not be adopted until at least one year has passed since adoption of the resolution of consideration, North Carolina General Statutes § 160A-49(i) (1987), or (2) a resolution of intent describing the area and an ordinance to annex the area both provide that the effective date of the annexation shall be at least one year from the date of passage of the annexation ordinance. North Carolina General Statutes § 160A-49(j) (1987).

Petitioners argue that the resolution of consideration should be the controlling date of initiation because the City chose to proceed under North Carolina General Statutes § 160A-49(i). However, we find the Supreme Court in *Town of Hazelwood v. Town of Waynesville*, 320 N.C. 89, 357 S.E.2d 686, *reh'g denied*, 320 N.C. 639, 360 S.E.2d 106 (1987) rejected such an analysis. The Court acknowledged that the first mandatory public procedural step for a municipality choosing to proceed with involuntary annexation under North Carolina General Statutes § 160A-37(i) (1987) (the procedure for towns of less than 5,000 which is comparable to the provision found in North Carolina General Statutes § 160A-49(i) for towns of 5,000 or more) is a resolution of consideration. However, the Court stated that the procedure stated in subsection (i) is itself an option. The Court held that the first mandatory public procedural step common to both means of initiating involuntary annexation, North Carolina General Statutes § 160A-37(i) or (j), is the passing of a resolution of intent. Therefore, the Court determined the critical step in initiating an annexation proceeding under either subsection is the resolution of intent. *Id.* at 93, 357 S.E.2d at 688.

The *Hazelwood* Court reasoned that North Carolina General Statutes § 160A-37 mandates a waiting period of at least one year

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before involuntary annexation may be completed, whether a municipality chooses to pass a resolution of consideration one year prior to its resolution of intent or whether it chooses simply to delay the effective date of the annexation ordinance for at least one year after passage of the resolution of intent. The statute does not require that involuntary annexation be initiated with a resolution of consideration; it does require a lengthy period of consideration preceding either the mandatory resolution of intent or the effective date of the annexation ordinance. *Hazelwood*, 320 N.C. 89, 357 S.E.2d 686.

The *Hazelwood* Court further noted that the resolution of consideration merely gives residents of the proposed area time within which to anticipate and adjust to the proposed annexation. It is only with the adoption of the resolution of intent that a municipality actually begins the annexation of a specific area.

In our determination of whether the resolution of intent or the resolution of consideration initiates an annexation proceeding pursuant to North Carolina General Statutes § 160A-48, we adopt the reasoning of the *Hazelwood* Court and find the resolution of intent initiated the involuntary annexation process. We affirm the trial court's ruling on this issue.

Petitioners' Second Assignment of Error

[2] Petitioners contend with their second assignment of error that the trial court erred by finding and concluding that the annexation area met the requirements of the subdivision test of North Carolina General Statutes § 160A-48(c)(3). More specifically, petitioners argue that the trial court erred in finding and concluding that Study Area #7 consisted of twenty separate lots and that part of Study Area #7 was properly identified as industrial in use. We agree.

North Carolina General Statute § 160A-48(c)(3) states in pertinent part:

(c) Part or all of the area to be annexed must be developed for urban purposes. An area developed for urban purposes is defined as any area which meets any one of the following standards:

. . .

(3) Is so developed that at least sixty percent (60%) of the total number of lots and tracts in the area at the time of

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annexation are used for residential, commercial, industrial, institutional or governmental purposes, and is subdivided into lots and tracts such that at least sixty percent (60%) of the total acreage, not counting the acreage used at the time of annexation for commercial, industrial, governmental or institutional purposes, consists of lots and tracts five acres or less in size.

North Carolina General Statutes § 160A-48(c)(3).

Part of the property that respondent Asheville sought to annex was recorded on a plat showing a 90 acre tract as divided into subdivision lots in 1921 by Henry Yandey. This included the 36.22 acres that is now the Hicklin property, Study Area #7.

The trial court made the following findings pertaining to the Hicklin property:

1. Prior to May 2, 1989, the Buncombe County tax records showed this Study Area #7 to be approximately 20 separate tax lots or tracts all owned by W. C. Hicklin.
2. These lots or tracts are shown as separate lots or tracts on recorded plats recorded in the Buncombe County Register of Deeds in Plat Book 3 at Pages 21 and 21A and in Plat Book 198 at Page 226A and 226B.
3. On May 2, 1989, at the request of W. C. Hicklin, the Buncombe County tax office consolidated all of these old tax lots and tracts into a single lot or tract identified as Lot 48.
4. This Study Area contains 36.22 acres.
5. The size of that portion formerly known at [sic] Lot 46 is 14.39 acres.

. . .

In light of this Court's previous ruling that the City has complied with the statute in making its calculations and used methods which produced reasonably accurate results, the Court would hold that the City was correct in counting this Study Area as 20 separate lots.

Findings of fact made below are binding on the appellate court if supported by the evidence, even where there may be evidence to the contrary. *Humphries v. City of Jacksonville*, 300 N.C. 186,

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187, 265 S.E.2d 189, 190 (1980). Petitioners argue that the trial court's findings were not supported by the evidence in that the classification of the Hicklin property was inaccurate causing inaccurate results of the subdivision test for purposes of meeting the requirements of North Carolina General Statutes § 160A-48.

Where an appeal is taken from adoption of an ordinance and the proceedings show prima facie that there has been substantial compliance with the statute, the burden is on the petitioners challenging the ordinance to show competent evidence that the City in fact failed to meet the statutory requirements. *In re Annexation Ordinance*, 278 N.C. 641, 180 S.E.2d 851 (1971).

North Carolina General Statutes § 160A-54 (1987) provides that municipalities seeking to annex new areas into their corporate limits must "use methods calculated to provide reasonably accurate results" in determining the degree of land subdivision for purposes of meeting the requirements of North Carolina General Statutes § 160A-48. In reviewing whether the requisites of North Carolina General Statutes § 160A-48 have been met, the court must accept the estimate as to the degree of land subdivision by the municipality

if the estimates are based on an actual survey, or on county tax maps or records, or on aerial photographs, or on some other reasonably reliable source, unless the petitioners on appeal show that such estimates are in error in the amount of five percent (5%) or more.

North Carolina General Statutes § 160A-54(3) (1987).

In addition, the North Carolina Supreme Court in *Thrash v. City of Asheville*, 327 N.C. 251, 393 S.E.2d 842 (1990) held that the accuracy of a subdivision test must reflect actual urbanization of the proposed area. The City's subdivision test calculations must reflect actual urbanization, not reliance on some artificial means of making an annexation appear urbanized. *Id.*

In the instant case, the city planner for respondent Asheville testified that in assessing whether the annexation area met the subdivision test she used aerial photographs of the area, on site inspections of the lots and tracts involved and tax records, including orthophotographic maps. As for the Hicklin property specifically, the city planner used the Buncombe County tax records which showed the Study Area to be approximately twenty separate tax lots or tracts all owned by W. C. Hicklin and the Buncombe County

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Register of Deeds Office which showed separate lots or tracts on recorded plats.

However, record evidence showed no actual urbanization of the Hicklin property. The Hicklin property contains twenty of the forty-nine lots as shown on the original 1921 plat. The parties stipulated at trial that the Hicklin property contained 36.22 acres. Mr. W. C. Hicklin testified that he has maintained his home on the property since 1930; that there have been no improvements on the 36.22 acres except the Hicklin's residence, his barn and outbuildings; that there have been no conveyances of any lots within the 36.22 acre tract since he acquired the land; and that only one road had been built since he acquired the land in 1930. Additional evidence revealed a .79 acre easement acquired by CP&L.

Classification of subdivisions are limited to tracts "that have been divided into lots that are located on streets laid out and open for travel and that have been sold or offered for sale as lots." North Carolina General Statutes § 105-287(b)(4) (1985).

We find the evidence, in the case *sub judice*, does not support the trial court's findings that the Hicklin property was twenty separate lots. The accuracy of the record evidence proffered by the City is belied by evidence before the reviewing Court of the actual condition of the property. Such records are not a "reasonably reliable" basis upon which estimates may be made for purposes of determining subdivision. *Thrash*, 327 N.C. at 251, 393 S.E.2d at 842. It was therefore error to include the Hicklin property among the acreage counted as subdivided and used for residential purposes. North Carolina General Statutes § 160A-48(c)(3).

Petitioners also argue in their second assignment of error that former lot 46 which is part of the Hicklin property was classified incorrectly as an industrial use. Our Supreme Court has held that an area proposed for annexation is improperly classified as property in use for industrial purposes where there is no evidence that the land in question is being used either directly or indirectly for industrial purposes. *R. R. v. Hook*, 261 N.C. 517, 135 S.E.2d 562 (1964). When compliance with the statutory requirements is in doubt, the determination of whether an area is used for a purpose qualifying it for annexation will depend upon the particular circumstances. *Lithium Corp. v. Bessemer City*, 261 N.C. 532, 135 S.E.2d 574 (1964). Where there has been no showing that the extent of industrial use was insignificant as compared to nonindustrial

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use, petitioner has failed to carry his burden to demonstrate a misclassification. *Food Town Stores, Inc. v. City of Salisbury*, 300 N.C. 21, 265 S.E.2d 123 (1980).

From our earlier determination that the Hicklin property was not twenty separate lots but one 36.22 acre tract of land, we examine the evidence presented by petitioners. Petitioners' evidence revealed that former lot 46 is part of the 36.22 acre tract known as the Hicklin property. The City subdivided the 36.22 acre Hicklin property into twenty separate lots and determined that former lot 46 comprised 14.39 acres. The 14.39 acre lot is bisected by a .79 acre easement used by CP&L. The .79 acre easement carries 230,000 volt high tension lines which are supported by steel towers. Other than the power lines, there are no other structures located on the 14.39 acres of land. The remaining 21.83 acres of the Hicklin property are used for residential purposes.

Because we no longer consider the land as twenty separate lots but one large 36.22 acre tract, we find the industrial use of the property is insignificant compared to the nonindustrial use of the entire 36.22 acre tract, and therefore, the petitioners have carried their burden that the property was incorrectly classified as industrial in use.

[3] We now consider whether the subdivision test has been met. The trial court found that the total vacant and residential acreage in the annexation area was 437.37 acres. Of that amount, the trial court found that 272.58 acres was comprised of lots and tracts five acres or less in size. Based thereon, the trial court determined the percentage to be 62.32%.

However, when the Hicklin property is counted as one lot, when former lot 46 is classified as part of the one large Hicklin tract and when the stipulated acreage of the Hicklin property, 36.22, is added, 461.18 is the total amount of vacant and residential acreage. Of that 461.18 acres, 260.17 acres are comprised of lots and tracts five acres or less in size. Based on the new calculations, we determine the percentage to be 56.41%. The annexation area fails to meet the 60% minimum required under the subdivision test of North Carolina General Statutes § 160A-48(c)(3). Moreover, the difference between that figure and respondent Asheville's original figure of 64% exceeds the statutorily permissible five percent margin of error. North Carolina General Statutes § 160A-48(c)(3).

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Respondent's Cross-assignment of Error

Respondent contends with its cross-assignment of error that the trial court committed error in finding that Study Areas 9, 10, and 11 were industrial in use within the meaning of North Carolina General Statutes § 160A-48(c)(3).

Where a finder of fact makes a determination, it will be left undisturbed on appeal if there is competent evidence to support it. *Lemmerman v. A. T. Williams Oil Co.*, 318 N.C. 577, 350 S.E.2d 83, *reh'g denied*, 318 N.C. 704, 351 S.E.2d 736 (1986). We have examined the record evidence and find that each of the trial court's findings of fact is supported by competent evidence, the testimony of James Baldwin, right-of-way agent for CP&L. We find there was no error.

Because petitioners succeeded in their burden of showing by competent evidence that respondent Asheville has failed to comply with the statutory requirements for annexation, the trial court erred in affirming Ordinance No. 1761.

The decision of the trial court is reversed.

Judges ORR and MCCRODDEN concur.

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No. 9227DC1088

No. 9227DC1089

(Filed 7 December 1993)

1. Divorce and Separation § 246 (NCI4th)— alimony—failure to make adequate findings—order reversed

Where the trial court failed to make any findings regarding the accustomed standard of living of the parties prior to separation, the expenses of each party at the time of trial, the value of each party's estate at the time of the hearing, or the contribution each made to the financial status of the family during the course of the marriage, the court's findings

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only as to the parties' earnings could not support a conclusion that plaintiff was the dependent spouse or that defendant was the supporting spouse, and the determination that plaintiff was entitled to alimony must therefore be reversed.

Am Jur 2d, Divorce and Separation § 534.**2. Divorce and Separation § 354 (NCI4th)— child custody—no finding that plaintiff fit and proper person—order reversed**

The trial court's order awarding child custody to plaintiff is reversed where the trial court made some findings of fact as to the unfitness of defendant but failed to make any findings of fact regarding the fitness of plaintiff.

Am Jur 2d, Divorce and Separation § 354.**3. Divorce and Separation § 117 (NCI4th)— equitable distribution—classification of property—insufficiency of findings—time of valuation not found**

The trial court's judgment of equitable distribution is reversed where the only findings in support of classifications of property were that the parties were married on 27 June 1975 and separated on 16 July 1990; these findings were inadequate to support the classification; and the judgment did not reflect that the property was valued, as required, on the date of separation.

Am Jur 2d, Divorce and Separation § 879.

Appeal by defendant from judgments and order entered 15 April 1992 in Cleveland County District Court by Judge George W. Hamrick. Heard in the Court of Appeals 1 October 1993.

Hamrick, Mauney, Flowers & Martin, by Fred A. Flowers, for plaintiff-appellee.

Law Office of Daniel A. Kuehnert, by Daniel A. Kuehnert, for defendant-appellant.

GREENE, Judge.

George Hunt (defendant) appeals from judgments and order entered on 15 April 1992 in Cleveland County District Court by Judge George Hamrick awarding Linda W. Hunt (plaintiff) alimony, child custody, and an equitable distribution of marital property.

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Defendant does not appeal an award of child support entered on the same date. Because these appeals involve common questions of law, we consolidate them for appeal pursuant to Rule 40 of the North Carolina Rules of Appellate Procedure.

Defendant and plaintiff were married on 27 June 1975 and lived together as husband and wife until 16 July 1990 when they separated. Two children were born of the marriage and both children were minors at all times relevant to this case.

Plaintiff filed a complaint seeking alimony, custody of the parties' minor children, and child support. This action was docketed on the court calendar as 90 CVD 1198. On 15 August 1991, plaintiff brought a second action seeking an absolute divorce and an equitable division of the marital property. This action was docketed on the court calendar as 91 CVD 1665. The actions for divorce, alimony, child custody and support, and equitable distribution were informally consolidated for trial.

A judgment of absolute divorce was entered in 91 CVD 1665. The judgment entered in 90 CVD 1198—plaintiff's action for alimony and child custody and support—ordered the equitable distribution of the parties' marital property. The judgment and order entered in 91 CVD 1665—plaintiff's action for equitable distribution—granted plaintiff alimony in a lump sum award of \$7,000.00, custody of the minor children, and \$136.00 per month in child support.

In the judgment and order which granted plaintiff alimony and child custody and support, the trial court made the following pertinent findings of fact:

2. . . . That the defendant began imposing his religious beliefs upon the minor children, making them watch certain tapes, listening to recorded tapes and exposing them to other religious materials for the childrens' [sic] instruction.

3. That the minor children developed major depression episodes involving loss of appetite, loss of sleep, digestive problems, nightmares, and they became preoccupied with the occult and supernatural, and that they developed difficulty with thought content

4. That the plaintiff's gross income is \$1,250.00 per month and the defendant's gross income is \$2,700.00 per month.

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5. . . . The Court finds that the plaintiff was financially dependent upon the defendant for a substantial portion of her support, maintenance, and financial well-being.

Based upon these findings, the court made the following pertinent conclusions of law:

[I]t is in the best interest of the minor children that they be placed in the primary care, custody and control of the plaintiff

. . . that the defendant is a substantial supporting spouse according to the laws of the State of North Carolina, and that the plaintiff should be awarded a lump sum alimony award in the amount of \$7,000.00.

The court then entered an order which granted custody of the children to plaintiff and ordered defendant to pay plaintiff \$7,000.00 "as a lump sum award of rehabilitative alimony."

The equitable distribution judgment assigned a "fair market value" to the properties classified as marital and separate and distributed the marital property equally. In support of the classification of the property, the trial court found that "the parties were married on the 27th day of June, 1975 and separated on the 16th day of July, 1990."

The issues presented are whether: (I) the trial court's findings of fact are supported by sufficient evidence; (II) the trial court's findings of fact are sufficient to support the conclusions of law regarding (A) plaintiff's entitlement to alimony and the amount of the alimony award; (B) the custody of the minor children; and (C) the classification and valuation of the property owned by the parties; (III) the trial court erred by denominating the alimony award to plaintiff "rehabilitative alimony"; and (IV) the trial court erred by entering the alimony and child custody order in plaintiff's action for equitable distribution and by entering the equitable distribution award in plaintiff's action for alimony and child custody.

I

The record contains no transcript of the hearing at which the trial court considered the questions of child custody and alimony or of the hearing at which the court considered the matter of equitable distribution. The record reveals that the hearing was

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recorded on audio tape, however, this recording was of such poor quality that it was impossible for a transcript to be made. Because of the lack of a transcript, we cannot determine from the record before us whether the trial court's findings of fact are supported by competent evidence. Where the evidence upon which the trial court based its findings is absent from the record, it is presumed the trial court's findings of fact were supported by competent evidence. *In re Botsford*, 75 N.C. App. 72, 75-76, 330 S.E.2d 23, 25 (1985). We therefore reject defendant's argument that the trial court's findings of fact were based on insufficient evidence.

II

A

Alimony

[1] Only dependent spouses are entitled to alimony in North Carolina. N.C.G.S. § 50-16.2 (1987). A dependent spouse is defined as one "who is **actually substantially dependent** upon the other spouse for his or her maintenance and support or is **substantially in need** of maintenance and support from the other spouse." N.C.G.S. § 50-16.1(3) (1987) (emphases added). "Actually substantially dependent" requires that "the party seeking alimony would be actually unable to maintain the accustomed standard of living [established before separation] from his or her own means." *Williams v. Williams*, 299 N.C. 174, 181, 261 S.E.2d 849, 855 (1980). In other words, to be "actually substantially dependent," the party seeking alimony must be entirely without the means to maintain the pre-separation accustomed standard of living. "[S]ubstantially in need" requires "that the spouse seeking alimony establish that he or she would be unable to maintain his or her accustomed standard of living (established prior to separation) without [some] financial contribution from the other." *Id.* at 181-82, 261 S.E.2d at 855. Because the determination of dependency requires application of legal principles, it is a conclusion of law, *Quick v. Quick*, 305 N.C. 446, 452, 290 S.E.2d 653, 658 (1982), and the trial court must base this determination on "findings of fact sufficiently specific to indicate that the court considered the factors set out in *Williams*." *Talent v. Talent*, 76 N.C. App. 545, 548, 334 S.E.2d 256, 259 (1985). The *Williams* factors include (1) the accustomed standard of living of the parties prior to the separation, (2) the income and expenses of each of the parties at the time of the trial, (3) the value of the estates, if any, of both spouses at the time of the hearing,

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and (4) "the length of [the] marriage and the contribution each party has made to the financial status of the family over the years." *Williams*, 299 N.C. at 183-85, 261 S.E.2d at 856-57.

In this case, the trial court entered findings that plaintiff's gross income was \$1,250.00 per month, that defendant's gross income was \$2,700.00 per month, and that the plaintiff was "financially dependent upon the defendant." Based on these findings, the court concluded that defendant is a supporting spouse. There is no conclusion that the plaintiff is the dependent spouse, and although the better practice would be to enter such a conclusion, it is not fatal. A supporting spouse is defined as the spouse "upon whom the other spouse is actually substantially dependent or from whom such other spouse is substantially in need of maintenance and support." N.C.G.S. § 50-16.1(4) (1987). Thus, it naturally follows that a spouse, here the plaintiff, that has a "supporting spouse," is the "dependent spouse."

The court failed to make any findings regarding the accustomed standard of living of the parties prior to the separation, the expenses of each party at the time of the trial, the value of each party's estate at the time of the hearing, or of the contribution each party made to the financial status of the family during the course of the marriage. Accordingly, because the findings do not reflect that the trial court considered the "*Williams* factors," they cannot support a conclusion that plaintiff is the dependent spouse or that defendant is the supporting spouse, and the determination that plaintiff is entitled to alimony must be reversed.

Furthermore, in regard to the amount of the alimony award, N.C. Gen. Stat. § 50-16.5(a) states: "Alimony shall be in such amount as the circumstances render necessary, having due regard to the estates, earnings, earning capacity, condition, accustomed standard of living of the parties, and other facts of the particular case." N.C.G.S. § 50-16.5(a) (1987).

Under our case law, an alimony order is valid only if the trial court has made detailed findings concerning (1) the estates of the parties; (2) the earnings of the parties; (3) the earning capacity of the parties; (4) the condition of the parties; and (5) the accustomed standard of living of the parties. *Quick*, 305 N.C. at 455-56, 290 S.E.2d at 659-60; *Skamarak v. Skamarak*, 81 N.C. App. 125, 128, 343 S.E.2d 559, 562 (1986); *Spencer v. Spencer*, 70 N.C. App. 159, 170, 319 S.E.2d 636, 645 (1984). The requirement of detailed findings

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on each of these factors is "not a mere formality or an empty ritual; it must be done." *Skamarak*, 81 N.C. App. at 128, 343 S.E.2d at 562.

In this case, the trial court made findings only as to the parties' earnings. There were no findings as to the parties' estates, earning capacities, conditions, or accustomed standard of living and the record contains no indication that these factors were considered by the trial court. Accordingly, the determination that plaintiff is entitled to alimony in the amount of \$7,000.00 is unsupported by required findings of fact and is reversed.

B

Child Custody

N.C. Gen. Stat. § 50-13.2(a) provides:

An order for custody of a minor child entered pursuant to this section shall award the custody of such child to such person, . . . as will best promote the interest and welfare of the child. An order for custody must include findings of fact which support the determination of what is in the best interest of the child.

N.C.G.S. § 50-13.2(a) (1987).

[2] The determination of what "will best promote the interest and welfare of the child," that is, "what is in the best interest of the child," is a conclusion of law, *Steele v. Steele*, 36 N.C. App. 601, 604, 244 S.E.2d 466, 468 (1978), and this conclusion must be supported by findings of fact as to the characteristics of the parties competing for custody. *Id.* "These findings may concern the physical, mental, or financial fitness or any other factors brought out by the evidence and relevant to the issue of the welfare of the child." *Id.* These findings cannot, however, be mere conclusions. *See Kerns v. Southern*, 100 N.C. App. 664, 667, 397 S.E.2d 651, 653 (1990) (holding conclusory statements in visitation dispute were not adequate to support awarding visitation rights).

In this case, the trial court made some findings of fact as to the unfitness of defendant, and based on those findings concluded as a matter of law "that it is in the best interest of the minor children that they be placed in the primary care, custody and control of the plaintiff." The trial court's order, however, failed to make any findings of fact regarding the fitness of plaintiff. It

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does not necessarily follow that because defendant is not a fit person to have custody of the children, that plaintiff is fit. Accordingly, the conclusion that it would be in the children's best interest for plaintiff to have custody is unsupported by sufficient findings of fact and the custody order must be reversed.

C

Equitable Distribution

[3] Because the classification of property in an equitable distribution proceeding requires the application of legal principles, this determination is most appropriately considered a conclusion of law. *See Quick*, 305 N.C. at 452, 290 S.E.2d at 658. The conclusion that property is either marital, separate or non-marital, *see Chandler v. Chandler*, 108 N.C. App. 66, 68, 422 S.E.2d 587, 589 (1992), must be supported by written findings of fact. *See Armstrong v. Armstrong*, 322 N.C. 396, 403, 368 S.E.2d 595, 599 (1988). Appropriate findings of fact include, but are not limited to, (1) the date the property was acquired, (2) who acquired the property, (3) the date of the marriage, (4) the date of separation, and (5) how the property was acquired (i.e., by gift, bequest, or purchase). *See* N.C.G.S. § 50-20(b)(1) (defining marital property); N.C.G.S. § 50-20(b)(2) (defining separate property).

In this case, although certain properties were classified as marital and other properties classified as separate, the only findings in support of the classifications are that the parties were married on 27 June 1975 and separated on 16 July 1990. There are no findings as to when the property was acquired, how it was acquired, or by whom it was acquired. Therefore, the classifications cannot be sustained because they are not supported by adequate findings of fact.

Furthermore, the equitable distribution judgment must be reversed because the judgment does not reflect that the property was valued, as is required, on "the date of the separation of the parties." N.C.G.S. § 50-21(b) (1992). The findings of fact and conclusions of law simply refer to the "fair market value" of the property, without identifying that it was the fair market value at the date of separation.

Because the conclusions of law classifying and valuing the marital property of the parties were not supported by adequate findings of fact, the judgment of equitable distribution must be reversed.

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III

Because we have reversed the award of alimony in this case, it is not necessary to address defendant's contention that the trial court erred in awarding plaintiff "rehabilitative alimony." We note, however, that in North Carolina alimony may be awarded only to a dependent spouse where that spouse is actually substantially dependent upon the supportive spouse or is substantially in need of support and the supporting spouse was at fault in the break-up of the marriage. N.C.G.S. §§ 50-16.1, -16.2 (1987). North Carolina law does not embrace the concept of "rehabilitative alimony," the purpose of which is to enable a spouse who has foregone economic opportunities during the marriage to acquire the market skills necessary to obtain employment which will allow her to support herself. *See* Ira M. Ellman, Paul M. Kurtzman & Katharine T. Bartlett, *Family Law* 286 (2d ed. 1991); 2 Homer H. Clark, Jr., *The Law Of Domestic Relations in the United States* 265 (2d ed. 1987).

IV

It appears that due to a clerical error, the orders in these two cases were incorrectly captioned, thereby resulting in the alimony and child custody order being entered in plaintiff's action for equitable distribution and the order of equitable distribution being entered in plaintiff's action for alimony and child custody. Because we have reversed and remanded both orders, we do not address defendant's contention that the court exceeded its authority by entering these orders. We assume this error will not reoccur upon remand.

In summary, we reverse both the order granting plaintiff alimony and child custody and the order for equitable distribution. Because there is no record upon which the trial court could rely to make the proper determination of these issues, there must be a new trial on the issues of alimony, child custody, and equitable distribution. Although neither party has appealed or argued the child support award, because we have reversed the award of child custody and ordered a new trial on this issue, we vacate the child support award and order a new trial on that issue as well.

Reversed and remanded for new trials.

Judges EAGLES and ORR concur.

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STATE OF NORTH CAROLINA v. JOYCE BARNES OXENDINE

No. 9316SC69

(Filed 7 December 1993)

1. Constitutional Law § 301 (NCI4th) — embezzlement — effective assistance of counsel — failure to present a defense

Defendant received effective assistance of counsel in a prosecution for embezzlement by a public officer where defense counsel did not present evidence but that decision did not constitute unreasonable professional judgment. Defendant's exculpatory statements were put before the jury in the State's evidence without defendant having to answer any questions on cross-examination, much of the testimony of defendant's potential witnesses was cumulative, and defendant's counsel gained a significant tactical advantage in not presenting evidence in that defendant could then both open and close oral arguments to the jury. The opportunity to open and close arguments can be particularly significant when the State's case is based purely on circumstantial evidence, as it was here.

Am Jur 2d, Criminal Law §§ 752, 985-987.**2. Evidence and Witnesses § 969 (NCI4th) — embezzlement — tax office records — hearsay — public records exception**

The trial court properly admitted tax department records under the public records exception to the hearsay rule in a prosecution for embezzlement by a public officer where defendant's supervisor, the collection supervisor of the tax department, identified each of the challenged records as records belonging to the tax department and testified that each record was generated and maintained by the tax department. All that is required to authenticate public records is evidence that "a purported public record, report, statement, or data compilation, in any form, is from the public office where items of this nature are kept." N.C.G.S. § 8C-1, Rule 901(b)(7).

Am Jur 2d, Evidence §§ 914 et seq.

Appeal by defendant from judgment entered 8 September 1992 by Judge Joe Freeman Britt in Robeson County Superior Court. Heard in the Court of Appeals 6 October 1993.

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Defendant was employed with the Robeson County Tax Department (hereinafter tax department) as a tax clerk from 1984 until her termination for these charges in 1991. An internal investigation was launched when several discrepancies were revealed in taxpayer accounts during an audit of the tax department for the fiscal year ending 1990. On 9 September 1991, defendant was indicted on four counts of embezzlement by a public officer, G.S. 14-92. On 4 September 1992, a jury found defendant guilty on all four counts. On 8 September 1992, the trial court sentenced defendant to two consecutive three year sentences on two counts (91 CRS 16283 and 91 CRS 16284) and prayer for judgment was continued on the remaining two counts (91 CRS 16285 and 91 CRS 16286).

At trial the State's evidence tended to show the following: In June 1990, the accounting firm of Dean and Wilkins, C.P.A.s conducted an audit of the Robeson County Tax Department for the fiscal year ending 1990. As part of that audit, Ms. Patty Dean, a certified public accountant and partner in the firm, sent verification forms to randomly selected taxpayers. The taxpayers were to verify the account balance on the form shown by the tax department records and return the form. When Ms. Dean received a response indicating a discrepancy, she examined the tax department records to try to reconcile the differences. Ms. Dean received responses from three taxpayers indicating that each taxpayer had paid taxes which had not been credited to their accounts. Ms. Dean examined the tax department records for these accounts and found in each instance that although the taxpayers' checks had been properly deposited in the Robeson County bank account, the taxpayers' tax accounts had not been credited. Ms. Dean also found that the taxpayers' checks had not been misapplied to other taxpayers' accounts and that the daily journals of the clerk who received the taxpayers' checks showed no cash overages or shortages on the days that the clerk received them. Ms. Dean concluded that in each instance cash in the amount of the taxpayers' checks had not been properly accounted for.

Defendant's supervisor, Gary N. Foley, Jr., testified that defendant's primary responsibility as a tax clerk was to receive payments from taxpayers and to properly account for those payments. Mr. Foley explained the duties of a tax clerk. He testified that when a clerk receives a payment, they are to make a computer entry crediting the taxpayer's account. When the clerk receives a check as a payment, they are required to place their initials

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on the check. Each clerk maintains a daily journal which shows all the items taken in for the day. At the end of the day, each clerk prepares an adding machine tape showing all the checks they received that day. The clerk then adds to that total the cash on hand. The sum of the checks and cash should equal the computer balance and the daily journal balance. The adding machine tapes are initialed and dated by the clerk and kept in the tax department records. Each clerk then prepares a daily check-up sheet listing the checks, cash, and combined check and cash totals for the day. The daily check-up sheet also has a space to indicate whether there are any cash overages or shortages. A cash overage or shortage should be brought to the attention of the supervisor if the clerk cannot locate the problem. These daily check-up sheets are also signed by each individual clerk and kept as part of the tax department's records. The clerk either turns the cash in to the supervisor at the end of the day or locks it in the cash drawer and places it in the vault.

Mr. Foley identified defendant's initials on the taxpayers' checks which had not been credited to the taxpayers' accounts and which were also the subject of the indictment. Mr. Foley also identified defendant's initials on her adding machine tape which also showed that defendant had received and processed those checks. Mr. Foley identified defendant's initials on her daily check-up sheet which showed that on the days defendant received and processed those checks, she did not record any cash overages or shortages for those days. In sum, Mr. Foley testified that on each of the four counts alleged in the indictment, a taxpayer had made a payment by giving a check to defendant which she included on her adding machine tape. The tax department's bank deposit the following day included the amount of the checks, but there was no record of any of the checks having been posted to any particular account. Since defendant's check-up sheet for those dates showed a balance with no overage or shortage, Mr. Foley testified that he could not account for the discrepancies. The county later had to credit the taxpayers' accounts out of the general fund.

SBI Agent Tony Underwood was assigned to investigate the account irregularities in the tax department. After reviewing the tax department records, Agent Underwood interviewed defendant. Defendant cooperated with Agent Underwood and denied any wrongdoing. Defendant gave explanations as to where the missing money might have gone, but after a thorough review of the tax department

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records, Agent Underwood determined that the account discrepancies could not be reconciled by erroneous postings. Agent Underwood concluded that there was a cash shortage between the amount of cash transactions defendant processed for the day and the amount of cash that she reported on her collection summary sheet for the end of the day. In each instance, the cash shortage was equal to the amount of the checks alleged in the indictment.

When Agent Underwood arrested defendant, she again maintained that she had done nothing wrong. She told Agent Underwood that she had made many mistakes in her work but that she had never taken any money out of the tax department. She said that she had on occasions used her own money to make up the shortages. Defendant told Agent Underwood that on one occasion she wrote a check for \$400 to try to make up a shortage of money. Defendant also told Agent Underwood that other people in the tax department office had access to the cash in the vault and that other employees had computer access to her work.

Defendant presented no evidence. The jury returned a guilty verdict on all four counts charged in the indictment. Defendant appeals.

Attorney General Michael F. Easley, by Assistant Attorney General Charlie C. Walker, for the State.

Cheshire, Parker, Hughes & Manning, by Joseph B. Cheshire, V and Robert M. Hurley, for defendant-appellant.

EAGLES, Judge.

Defendant's twenty-four assignments of error can be grouped into two main arguments. First, defendant contends that she was prejudiced by the ineffective assistance of her trial counsel in violation of the Sixth and Fourteenth Amendments to the United States Constitution. Second, defendant contends that the trial court committed prejudicial error in admitting certain tax department records into evidence and allowing witnesses to testify as to the information in those documents. We find no error.

I.

[1] Defendant contends that she received ineffective assistance of counsel and that counsel's ineffectiveness denied defendant her right to a fair trial under the Constitution of North Carolina and

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under the Sixth and Fourteenth Amendments to the United States Constitution. We disagree.

In *Strickland v. Washington*, 466 U.S. 668, 80 L.Ed.2d 674 (1984), the United States Supreme Court held that in order for a convicted defendant to prevail on an ineffective assistance of counsel claim, the defendant must satisfy a two-part test. The defendant must first show that counsel's performance was so deficient that counsel was not "functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* at 687, 80 L.Ed.2d at 693. In addition to showing that counsel's performance was deficient, the defendant must also show that counsel's deficient performance deprived the defendant of a fair trial, a trial whose result is reliable. *Id.* There is no reason for a court to address both components of this test if the defendant makes an insufficient showing on one of them. *Id.* at 697, 80 L.Ed.2d at 699. The *Strickland* test is also the standard for measuring ineffective assistance of counsel claims under the North Carolina Constitution. *State v. Swann*, 322 N.C. 666, 370 S.E.2d 533 (1988); *State v. Braswell*, 312 N.C. 553, 324 S.E.2d 241 (1985).

In order to satisfy the performance component of the *Strickland* test, a defendant must show that "counsel's representation fell below an objective standard of reasonableness." *Strickland v. Washington*, 466 U.S. 668, 688, 80 L.Ed.2d 674, 693 (1984). The defendant must identify the acts or omissions of counsel that were the result of unreasonable professional judgment. *Id.* at 690, 80 L.Ed.2d at 695. A reviewing court must then judge the reasonableness of counsel's challenged conduct in light of the facts and circumstances of the particular case and determine whether the identified acts or omissions were outside the wide range of professionally competent assistance. *Id.* In making this determination, counsel is strongly presumed to have rendered adequate assistance and exercised reasonable professional judgment. *Id.*

Here, defendant essentially contends that she was prejudiced by defense counsel's failure to present evidence. Defendant argues that there was ample evidence from which to present an efficient defense. Defendant contends that she provided defense counsel with a list of potential defense witnesses who were willing to testify on her behalf. These witnesses included: 1) Ms. Penny Stephens, a former tax clerk who worked with defendant prior to the investigation of these charges; 2) Ms. Brenda Fairley, a tax clerk

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who worked with defendant at the time these charges were investigated; and 3) Mr. Thomas Jones, a delinquent tax collector who also worked with defendant.

Defendant contends that Ms. Stephens would have testified that defendant's supervisor, Mr. Foley, had made offensive and inappropriate comments to defendant. Ms. Stephens would also have testified that Mr. Foley had threatened her at one time saying, "the next time money is taken, I am going to pin it on you." Defendant argues that Ms. Fairley would have testified that she had seen Mr. Foley enter the computer and "backdate information to make it appear that tax money had been paid on an earlier date." Ms. Fairley would also have testified that Mr. Foley had asked her to credit a tax account without the proper documentation. Finally, defendant contends that Mr. Jones would have testified concerning the operation of the tax department and its computer system.

Defendant also provided defense counsel with the names of two prominent witnesses who were willing to testify to her good character and her reputation for honesty. Defendant also argues that since the State's case consisted entirely of circumstantial evidence, defense counsel should have allowed defendant to take the stand and refute the charges in her own words. Defendant contends that she should have been allowed to take the stand because she had no prior criminal history with which the State could have impeached her.

With the exception of the two character witnesses, we are not persuaded that any of the other potential defense witnesses' testimony was relevant to defendant's charges. It is clear that defense counsel could have presented a defense with the testimony of the potential defense witnesses. The question we must answer is whether defense counsel's failure to present evidence in defendant's defense was outside the exercise of reasonable professional judgment. We hold that it was not.

The State's case against defendant was based entirely upon circumstantial evidence. There was no incontrovertible eyewitness evidence that showed that defendant had misapplied or embezzled tax department funds. Rather, the State's case was based entirely upon a series of deductions drawn from various tax department ledgers, receipts and work documents. In deciding not to present evidence, defense counsel apparently made a strategic judgment

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that the jury would not convict defendant solely on the basis of this circumstantial evidence. Although in hindsight we might conclude that defense counsel may have made an error in judgment, defense counsel's decision not to present evidence was not unreasonable in light of the facts and circumstances of this case.

Although defendant wanted to testify in her own behalf to assert her innocence, Agent Underwood from the State Bureau of Investigation had already testified that defendant steadfastly maintained her innocence during both his initial interview with defendant and after defendant was arrested. Defendant's exculpatory statements were put before the jury without defendant having to answer any questions on cross-examination. The usefulness of defendant's potential defense witnesses is questionable at best. Much of their testimony was cumulative because evidence similar to the statements in their affidavits was admitted through other witnesses who testified at trial. Furthermore, defendant's trial counsel gained a significant tactical advantage in deciding not to present evidence. When a defendant elects not to present evidence, the defendant may both open and close oral arguments to the jury. General Rules of Practice for Superior and District Courts, Rule 10. The opportunity to both open and close oral arguments to the jury can be particularly significant when as here, the State's case is based purely on circumstantial evidence. In *Strickland*, the Supreme Court stated that:

Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable.

Strickland v. Washington, 466 U.S. 668, 689, 80 L.Ed.2d 674, 694 (1984). Accordingly, we conclude that defense counsel's decision not to present evidence in these circumstances was not unreasonable professional judgment.

II.

[2] Defendant contends that the trial court erred in admitting certain tax department records into evidence. These records included cancelled checks with defendant's initials on them that were not credited to the appropriate accounts, defendant's adding machine

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tape listing the cancelled checks and showing that defendant was the clerk who had processed them, defendant's collection summary reports which showed that she did not indicate any cash overage or shortage on the days that she received the checks, the returned account confirmation letters which initiated the investigation, and other various records of the tax department. Defendant argues that these records should have been excluded because they were not properly authenticated under the business records exception to the hearsay rule, G.S. 8C-1, Rule 803(6). Defendant contends that the State was required to show that the various records were made at or near the time of the transactions, or that the records were kept in the tax department's regular course of business. We disagree.

We need not discuss separately the admission of each disputed tax department record. Our analysis applies equally to all of the records at issue here. The tax department is a public office and its records are admissible under the public records exception to the hearsay rule. G.S. 8C-1, Rule 803(8). Rule 803(8) provides for the admission of "records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency" Here, all of the tax department records that were admitted were records setting forth the activities of the tax department. Defendant's contention that these records were improperly authenticated is without merit. All that is required to authenticate public records is evidence that "a purported public record, report, statement, or data compilation, in any form, is from the public office where items of this nature are kept." G.S. 8C-1, Rule 901(b)(7). The authenticity of an original public record or document may be proved by the testimony of its official custodian that it is a part of the records or files of the custodian's office. 1 L. Brandis, *Brandis on North Carolina Evidence*, § 153 p. 702 (1988); G.S. 8C-1, Rule 901, Advisory Committee's Note Example 7 ("Public records are regularly authenticated by proof of custody, without more").

Here, the State authenticated the challenged records through defendant's supervisor, Mr. Foley. Mr. Foley was the collection supervisor of the tax department and was responsible for keeping the records that are at issue here. Mr. Foley identified each of the challenged records as records belonging to the tax department and he testified that each record was generated and maintained by the tax department. Mr. Foley's testimony was sufficient to

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authenticate public records under Rule 901(b)(7). Accordingly, we conclude that the trial court properly admitted the challenged tax department records under the public record exception to the hearsay rule.

For the reasons stated, we find no error in the judgment of the trial court.

No error.

Judges ORR and GREENE concur.

MARTHA SMITH, ADMINISTRATRIX OF THE ESTATE OF RICHARD SMITH,
DECEASED v. N.C. DEPARTMENT OF NATURAL RESOURCES & COM-
MUNITY DEVELOPMENT

No. 9210IC1002

(Filed 7 December 1993)

1. State § 10 (NCI3d)— Tort Claims Act—appeal to full Commission—no findings and conclusions required—adoption of deputy commissioner's decision proper

Because deputy commissioners of the Industrial Commission have the same powers as the full Commission in an action under the Tort Claims Act and therefore have the authority to conduct hearings and enter findings and conclusions, and because the full Commission is not required to enter its own findings and conclusions, the full Commission did not err in this case in adopting the decision of the deputy commissioner as its own without entering its own findings of fact and conclusions of law. N.C.G.S. § 143-296.

Am Jur 2d, States, Territories, and Dependencies §§ 99 et seq.

2. State § 8.2 (NCI3d)— action under Tort Claims Act—location of deceased—sufficiency of evidence to support findings

In an action to recover under the Tort Claims Act for the wrongful death of plaintiff's husband who slipped and fell to his death at a State park, the evidence was sufficient to support the Industrial Commission's findings of fact with regard

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to the location of plaintiff's husband and son at the time of the fall.

Am Jur 2d, Federal Tort Claims Act § 136.**3. State § 8.2 (NCI3d)— accident at State park—no failure to warn adequately—danger obvious and apparent**

In an action to recover for the wrongful death of plaintiff's husband who slipped and fell to his death at a State park, there was no merit to plaintiff's contention that the State acted negligently and created a dangerous condition by attempting to warn of the danger of the falls with a sign which was "insufficient, inadequate and incomplete," since the danger surrounding the slippery rocks and waterfall which dropped 200 feet was obvious and apparent, and the warning sign was adequate.

Am Jur 2d, Negligence §§ 383 et seq.**4. State § 8.1 (NCI3d)— slip and fall over waterfall—contributory negligence—sufficiency of evidence**

The Industrial Commission did not err in concluding that plaintiff's husband was contributorily negligent in slipping and falling to his death over a waterfall in a State park where the husband failed to act reasonably and prudently in light of the fact that he was familiar with the area and should have been aware of the obvious dangers there, notwithstanding the possible presence of other people in an area of danger.

Am Jur 2d, Negligence §§ 842-844, 867-871, 1102, 1113.**5. Evidence and Witnesses § 218 (NCI4th)— accident at State park—evidence of remedial measures inadmissible**

In a tort claim action to recover for the wrongful death of plaintiff's husband who slipped and fell to his death in a State park, the hearing commissioner did not err in excluding exhibits which showed remedial measures taken by the State at the park subsequent to the accident since such evidence is not admissible to prove negligence or culpable conduct, and the State did not contest the feasibility of precautionary measures. N.C.G.S. § 8C-1, Rule 407.

Am Jur 2d, Evidence § 275.

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Admissibility of evidence of repairs, change of conditions, or precautions taken after accident—modern state cases. 15 ALR5th 119.

Appeal by plaintiff from order entered 8 June 1992 by J. Harold Davis, Commissioner, for the Full Commission of the North Carolina Industrial Commission. Heard in the Court of Appeals 16 September 1993.

White and Crumpler, by G. Edgar Parker and Joan E. Brodish, for plaintiff-appellant.

Attorney General Michael F. Easley, by Special Deputy Attorney General Elisha H. Bunting, Jr., for the State.

LEWIS, Judge.

On 22 June 1989 plaintiff filed a claim under the North Carolina State Tort Claims Act against the North Carolina Department of Natural Resources and Community Development (hereafter "the State"), seeking \$100,000 in damages for the wrongful death of her husband, Richard Carroll Smith. The case was heard in December 1990 before Deputy Commissioner Roger L. Dillard of the North Carolina Industrial Commission. Commissioner Dillard entered an order denying plaintiff's claim on 7 May 1991 after concluding that the State was not negligent and that plaintiff's husband was negligent and the sole and proximate cause of his own death. The full Commission affirmed and adopted this decision on 8 June 1992, and plaintiff now appeals from this order.

On 29 May 1988 plaintiff, her husband, and son, Andrew, were visiting Stone Mountain State Park in Wilkes County, North Carolina. While at the Park they visited Beauty Falls. The water at Beauty Falls flows over a dome-shaped rock before falling 200 feet. The evidence shows that the Smiths had been to Beauty Falls in April 1988, and were aware of the topography of the area and the magnitude of the flow. The Smiths picnicked above the falls, where there is a warning sign which says "Danger, Falls Below." Plaintiff testified that other people were in the same area. Plaintiff explained that they did not feel they were in a dangerous area, because the ground was level and the water level was low due to a drought that summer. Richard Smith and his son walked around a granite rock and played in the water after lunch, while plaintiff napped. Plaintiff awoke to her son's screams, and learned that

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her husband had slid on the rock and gone over the falls. Richard Smith died as a result of his fall.

On appeal plaintiff argues the full Commission erred in simply adopting the decision of the deputy commissioner without conducting its own hearing and entering its own findings and conclusions. Plaintiff also argues many of the findings of fact and conclusions of law are not supported by the evidence. Finally, plaintiff argues the hearing commissioner and the full Commission erred in failing to admit several of her exhibits into evidence.

I. Review by Full Commission

[1] Plaintiff's initial contention is that the full Commission failed to comply with N.C.G.S. §§ 143-291 and 143-292 by simply adopting the decision of the deputy commissioner without conducting its own hearing and making its own findings of fact and conclusions of law. We disagree. Deputy commissioners have full authority under the Tort Claims Act to carry out the purposes of the Act, and are vested with the same powers as members of the Industrial Commission. According to section 143-296,

[t]he Industrial Commission is authorized to appoint deputies and clerical assistants to carry out the purpose and intent of this Article, and such deputy or deputies are hereby vested with the same power and authority to hear and determine tort claims . . . as is by this Article vested in the members of the Industrial Commission.

N.C.G.S. § 143-296 (1990). The statute governing appeals to the full Commission states that the full Commission "may amend, set aside, or strike out the decision of the hearing commissioner and may issue its own findings of fact and conclusions of law." § 143-292 (1990). We find that the legislature's use of the word "may" indicates that although the full Commission is permitted to enter its own findings of fact and conclusions of law, it is not required to do so.

Thus, because *deputy commissioners have the same powers* as the full Commission and therefore have the authority to conduct hearings and enter findings and conclusions, and because the full Commission is not required to enter its own findings and conclusions, we find the full Commission did not err in the case at hand in adopting the decision of the deputy commissioner as its own.

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II. Sufficiency of Evidence

Our standard of review is very limited. The Commission's findings of fact are conclusive on appeal if supported by any competent evidence, *Paschall v. North Carolina Department of Correction*, 88 N.C. App. 520, 364 S.E.2d 144, *disc. review denied*, 322 N.C. 326, 368 S.E.2d 868 (1988), and "appellate review . . . is limited to two questions of law: (1) whether there was any competent evidence before the Commission to support its findings of fact; and (2) whether the findings of fact of the Commission justify its legal conclusion and decision." *Id.* at 522, 364 S.E.2d at 145.

A. Findings of Fact

[2] Plaintiff contends that the evidence does not support eight of the Commission's findings of fact. Findings of fact numbers 5 and 6 both concern the location of Richard Smith and his son at the time of the fall. Both findings indicate that the two had disregarded the warning and had travelled downstream to a dangerous area below the sign. Andrew Smith testified that he and his father had walked back up towards some steps. Plaintiff claims this testimony places the two at a spot above the warning sign at the time of the fall, and that it was therefore erroneous for the Commission to find that they were in a dangerous area.

However, Martha Smith testified that they picnicked that day in the area under the danger sign. She testified that after their picnic her husband and son travelled down to a pool of water located between the sign and the falls. This testimony constitutes competent evidence from which the Commission could find that Richard Smith and his son were in a dangerous area below the warning sign at the time of the accident.

Plaintiff also objects to finding of fact 15 in which the Commission stated that there was conflicting testimony over whether other people had been seen in the water around the warning sign. The Commission determined that even if people had been seen in the water, it would not be reasonable to assume that the danger sign could be ignored. Plaintiff again argues that Richard Smith did not venture below the sign, and we again find that competent evidence, Martha Smith's testimony, supports the finding that Richard was below the sign when he slipped and fell. We agree with the Commission that the possible existence of other people in the area would not render the warning sign meaningless.

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Plaintiff assigns error to findings of fact 3 and 4 regarding the routes travelled by the Smiths around the falls, finding number 11 regarding a prior fatality at the falls, finding number 12 regarding the admissibility of certain exhibits, and finding number 18 regarding certain photographs and the sloping nature of the area. However, plaintiff presents no argument regarding these objections in her brief before this Court, but only references the first twenty-three pages of the brief, which encompass three different arguments. We find that plaintiff has failed to comply with Rule 28 of the appellate rules, which requires an argument as to each question presented and permits citation to relevant authority and relevant portions of the transcript or record on appeal. N.C.R. App. P. 28(b)(5). Plaintiff's vague reference to the first portion of her brief is inadequate to preserve her objections to these findings of fact. Notwithstanding this error, we find that competent evidence supports the challenged findings of fact.

B. Negligence of State

[3] Plaintiff argues the Commission misapprehended the applicable law and grossly abused its discretion in determining that the State was not negligent, and that it had adequately warned of the danger of the falls and the surrounding area. Plaintiff argues that the State's negligence was a proximate cause of Richard Smith's death, and that liability attaches even if that negligence was not the sole proximate cause. *See Branch Banking & Trust Co. v. Wilson County Bd. of Educ.*, 251 N.C. 603, 111 S.E.2d 844 (1960). Plaintiff claims that the State acted negligently and created a dangerous condition by attempting to warn of the danger of the falls with a sign that was "insufficient, inadequate and incomplete." Plaintiff specifically avers that the State should have warned of the danger of the slippery rock at the top of the falls, a dangerous condition of which the State was aware due to a previous fatality at that location. Plaintiff thus accuses the State of a "negligent undertaking to warn."

We note that visitors to the park are invitees, and the State therefore has a duty to exercise ordinary care in maintaining the premises in a reasonably safe condition, and to warn invitees of hidden dangers or unsafe conditions. *See Blevins v. Taylor*, 103 N.C. App. 346, 407 S.E.2d 244, *cert. denied*, 330 N.C. 193, 412 S.E.2d 678 (1991) (stating general rule on invitees). Plaintiff relies on cases from other jurisdictions to support her argument that

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the State failed to adequately warn of the dangerous conditions. We note that the cases cited involve hidden or nonobvious dangers, such as submerged sandbars, *Herman v. State*, 439 N.Y.S. 2d 1018 (N.Y. Ct. Cl. 1981), *rev'd*, 463 N.Y.S. 2d 501 (N.Y. App. Div. 1983), *aff'd*, 482 N.Y.S. 2d 248 (N.Y. 1984) (New York's highest court agreed with the appellate court's reversal of the decision cited by plaintiff, and held that the State had no legal duty to warn of the danger of submerged sandbars because they are a natural phenomenon), and submerged rocks, *Mandel v. United States*, 793 F.2d 964 (8th Cir. 1986). The case at hand is distinguishable because it does not involve a hidden danger. The falls and surrounding rocks were obvious and clearly visible to any onlookers. In finding of fact number 16 the Commission noted that a park ranger testified that the sloping nature of the area is immediately apparent. In addition to the visibility and sound of the falls, the warning sign helped to make the dangerous nature of the area even more obvious.

Because the danger involved in the case at hand was obvious and apparent, we find the warning sign was adequate. We conclude that the Commission's findings of fact justify its legal conclusion that the State was not negligent.

C. Contributory negligence

[4] Plaintiff next contends that the Commission erred in concluding that Richard Smith was contributorily negligent. According to plaintiff, Richard Smith acted as a reasonable person. He was not aware that the exposed rocks were slippery and hazardous, and saw that other people got in the water in the area in question. Because he acted in the same manner as other people around him, plaintiff claims her husband was not contributorily negligent.

An invitee must act reasonably, using ordinary care to protect himself and discover obvious dangers. *See Prevette v. Wilkes Gen. Hosp., Inc.*, 37 N.C. App. 425, 428, 246 S.E.2d 91, 93 (1978). As stated above, we find that the Commission's findings of fact indicate that the danger of the falls should have been obvious and apparent to Richard Smith. Furthermore, Richard Smith and his family had been to the area one month earlier and were familiar with Beauty Falls and the surrounding area. We find Richard Smith failed to act reasonably and prudently in light of the fact that he was familiar with the area and should have been aware of the obvious dangers there, notwithstanding the possible presence of other people. We find the Commission's findings of fact support its conclusion that

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Richard Smith did not act reasonably and was contributorily negligent.

III. Admission of Exhibits

[5] Finally, plaintiff contends the Commissioner erred in failing to admit evidence of subsequent remedial measures shown in exhibits number 9 through 18 and discussed in exhibit number 29. As plaintiff correctly points out, it is unclear from the transcript of the proceedings whether or not exhibit 29 was admitted into evidence. For the purposes of this argument, we will assume that it was not. Plaintiff argues the exhibits were admissible under Rules 407 and 803(8) of the North Carolina Rules of Evidence. According to Rule 407, evidence of subsequent remedial measures is not admissible to prove negligence or culpable conduct, but such evidence may be offered for other purposes such as "proving ownership, control, or feasibility of precautionary measures, if those issues are controverted, or impeachment." N.C.G.S. § 8C-1, Rule 407 (1992). Rule 803(8) provides that public records and reports are an exception to the hearsay rule. § 8C-1, Rule 803(8) (1992).

Exhibits 9 through 18 are photographs of signs, railings and stairways constructed around the area of Beauty Falls after Richard Smith's death. Plaintiff argues they were admissible under Rule 407 because the State contested the feasibility of precautionary measures. We disagree. James Billings, the park superintendent, testified that the park could not be made "safe," but admitted that it could be made "safer" and mentioned several examples of possible precautionary measures. We find that the evidence was properly excluded under Rule 407, because the State did not challenge the feasibility of precautionary measures, nor did it contest ownership or control of the area.

Alternatively, plaintiff argues the evidence serves to impeach the State's contentions that the area could not be made safe, claiming that the new railings and sign now render that area completely safe. We find this position to be unsupported by the evidence. The fact that no accidents have occurred since the safety measures were put in place does not prove that accidents will not happen at Beauty Falls in the future. We believe the Commissioner correctly concluded that exhibits 9 through 18 were inadmissible.

Exhibit 29 is a report prepared by William Hubbard, Public Safety Officer in the Division of Parks and Recreation for the

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State of North Carolina, as a result of his investigation of Richard Smith's death. The report contains recommendations for subsequent remedial measures to be taken at the park. The State contends that it was to this portion of the report that it objected at the hearing. We conclude that even if the report could be admissible under the public records exception to the hearsay rules, it would still have to be excluded under Rule 407 because it very clearly addresses subsequent remedial measures. As stated above, we find that the ownership, control and feasibility of such measures were not controverted.

IV. Conclusion

We conclude that the Commission acted properly in affirming and adopting the findings and conclusions of the deputy commissioner. We also conclude the evidence supported the findings of fact which in turn supported the conclusions of law, and find the Commission did not err regarding the admissibility of plaintiff's exhibits.

No error.

Judges WELLS and MARTIN concur.

IN THE MATTER OF: DANIEL RAY SAFRIET, A MINOR

No. 9219DC1303

(Filed 7 December 1993)

1. Trial § 3.2 (NCI3d) — continuance denied — no abuse of discretion

The trial court did not abuse its discretion in denying respondent's request for a continuance of a hearing on the merits as to whether her child was neglected under N.C.G.S. § 7A-517(21) and in need of the care, protection, or supervision of the State where respondent had notice on 6 January that the hearing on the merits would take place on 24 February; respondent's trailer burned down around 3 February and she had no residence thereafter; and respondent did not contact her attorney from 6 January until 19 February.

Am Jur 2d, Continuance §§ 4, 5.

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2. Parent and Child § 130 (NCI4th) — child adjudicated as neglected juvenile — sufficiency of evidence

The trial court did not err in adjudicating respondent's child as a neglected juvenile where the court found that the child was in a filthy condition and was made fun of by other children because of his uncleanness; the mother was without a permanent residence; the grandparents and his residential school for the deaf did not know how to contact the mother in case of emergency; the mother had refused to enroll the child in the residential program so that he could learn proper hygiene skills; and the mother had only minimal contact with her son after his placement in the residential program. N.C.G.S. § 7A-517(21).

Am Jur 2d, Parent and Child §§ 34, 35.

On writ of certiorari to review the order entered 28 February 1992 in Randolph County District Court by Judge Vance Bradford Long. Heard in the Court of Appeals 28 October 1993.

Theresa A. Boucher for petitioner-appellee Randolph County Department of Social Services.

James G. Ligon, Jr. for respondent-appellant.

GREENE, Judge.

Iris Safriet (Ms. Safriet) petitioned this Court for review of a 28 February 1992 order denying her motion to continue, adjudicating her son, Daniel Ray Safriet (Daniel), as neglected, and awarding custody of him to Randolph County Department of Social Services (DSS).

On 30 December 1991, DSS filed a petition to determine whether Daniel is neglected under N.C. Gen. Stat. § 7A-517(21) or, in the alternative, dependent within N.C. Gen. Stat. § 7A-517(13) and whether he is in need of the care, protection, or supervision of the State. Based on this petition and pursuant to N.C. Gen. Stat. § 7A-574(a), the court ordered DSS to assume custody of Daniel for a maximum duration of five days. At a preliminary hearing on 3 January 1992 pursuant to N.C. Gen. Stat. § 7A-577, the court ordered legal custody to remain with DSS and authorized placement in the North Carolina School for the Deaf in Greensboro's (the School) residential program and placement at Daniel's maternal

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grandparents' home for weekend visitations. The court also appointed a guardian ad litem and attorney advocate.

After a seven day hearing pursuant to Section 7A-577, the court, on 6 January 1992, ordered that legal custody be awarded to Ms. Safriet, Daniel be enrolled in the residential program, and DSS monitor the case until the hearing on the merits, which was held pursuant to Section 7A-577 on 20 February 1992. At that time, Ms. Safriet moved for a continuance without prior notice of the motion because her trailer was destroyed by fire on 3 February 1992, leaving her without a permanent residence, and she had no contact with her attorney from 6 January to 19 February 1992.

On 28 February 1992, the trial court, denying her motion, stated that "there was nothing to prevent [Ms.] Safriet from contacting [her attorney] prior to [19 February 1992] but after the fire of her trailer . . . to request a continuance so as not to inconvenience the witnesses or the [trial] Court. The [trial] Court notes that this was not done; finds there's no reason to continue this case." The trial court then proceeded to adjudicatory and dispositional hearings on the merits.

The undisputed evidence is as follows: Daniel, born hydrocephalic, is a developmentally delayed and profoundly hearing impaired fourteen year old who attended the School as a day student for eleven years. As a day student, he appeared regularly with unwashed hair, filthy underwear, unclean body, dirty clothing, and foul smelling. On occasion, the teachers would be forced to bathe him in the dormitories and wash his clothing so that the other children did not complain and make fun of him. Ms. Sylvia Belbin (Ms. Belbin), a social worker at the School, testified "other children were making fun or laughing or saying something about Danny smelling bad."

Daniel showed little comprehension of bathing skills, daily living skills, or routine hygiene prior to enrolling in the residential program, which fosters social growth and assists students in development of independent, leisure, and daily living skills, including bathing, cleaning clothes, using deodorant, and brushing teeth. The School repeatedly requested that Ms. Safriet bring Daniel to School washed and with clean clothing, resulting in his appearing at School clean for one or two days; however, shortly after the request, he would again appear in a filthy condition. Ms. Safriet did not want Daniel in the residential program and refused to

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enroll him. Ms. Belbin testified that Daniel “needs a lot of structure He flourishes in routines.” If the structure of the residential program were not there, Ms. Belbin thinks “it would be a repeat of what we’ve seen for many years, a child coming to school dirty, unkept [sic] clothes with dirty hair, dirty body.” Furthermore, at the time DSS filed its petition to determine whether Daniel was neglected, Daniel and Ms. Safriet resided in her trailer which was extremely cluttered, had no electricity, and several broken windows.

Since the hearing on 6 January 1992, Ms. Safriet has transported Daniel to and from the School on Fridays and Sundays. Immediately after the hearing on 6 January 1992, she placed Daniel in her parents’ home for weekend visitations. She spent a limited amount of time with Daniel on the weekends, and since 6 January 1992, Ms. Safriet’s parents have been exclusively responsible for caring for Daniel outside of the residential program. She was called once by her parents in response to Daniel’s becoming ill, and Daniel and his grandparents waited approximately one hour for her to arrive in order for Daniel to obtain medical attention. She has also failed to provide the School or DSS with information on how to reach her in case of an emergency. Ms. Belbin testified that “[w]e’ve had a real difficult time even when Danny was with the mother and not in a residential program reaching her during the day. Sometimes she would bring Danny to school and he would be sick and we’d need to contact her and we would call all over the world, everybody’s number that we knew, and we’d have a hard time reaching her. So, we have a real difficult time now because she doesn’t have a residence that we know of,” and “if we needed to take him for emergency surgery or something like that I don’t know what we’d do because we do not know how to get in touch with her.” In addition, Daniel’s maternal grandmother testified that Ms. Safriet cannot do the best she can for Daniel right now because she has “no home to take him to.”

Daniel is thriving in the residential program and is making marked progress in daily living skills, communication skills, self help hygiene skills, and social skills. Daniel enjoys living in the dormitory and expresses his desire and wish to return to the dormitory and live in the residential program.

Based on this undisputed evidence, the court concluded that Daniel was a neglected juvenile pursuant to N.C. Gen. Stat.

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§ 7A-517(21) "in that the Juvenile does not receive proper care from his parent" and placed him in the custody of DSS, with placement at the School. A further order on 30 March 1992, pursuant to N.C. Gen. Stat. § 7A-668, continued legal custody with DSS pending appeal in this Court. Due to Ms. Safriet's failure to perfect the record on appeal, she filed a petition for writ of certiorari on 5 October 1992 which was allowed by this Court on 23 October 1992.

The issues presented are whether the trial court erred in (I) denying Ms. Safriet's motion for a continuance where she failed to contact her attorney from 6 January 1992 to 18 February 1992, and the hearing date was set for 24 February 1992; (II) adjudicating Daniel as a neglected juvenile pursuant to N.C. Gen. Stat. § 7A-517(21) because Daniel's physical, emotional, or mental well-being was impaired or in danger of being impaired due to Ms. Safriet's improper care; and (III) awarding legal custody of Daniel to DSS after adjudicating him to be a neglected juvenile.

I

[1] Generally, the denial of a continuance, which is within the trial court's sound discretion, will not be interfered with on appeal; however, if the ruling is "manifestly unsupported by reason," it is an abuse of discretion and subject to reversal. *Freeman v. Monroe*, 92 N.C. App. 99, 101, 373 S.E.2d 443, 444 (1988). Before ruling on a motion for a continuance, the judge should hear the evidence, pro and con, consider it judicially, along with whether the moving party has acted with diligence and in good faith and then rule with a view to promoting substantial justice. *Shankle v. Shankle*, 289 N.C. 473, 483, 223 S.E.2d 380, 386 (1976). N.C. Gen. Stat. § 7A-632 directly addresses the issue of continuances for a hearing involving a juvenile matter:

The judge may, for good cause, continue the hearing for as long as is reasonably required to receive additional evidence, reports, or assessments that the court has requested, or other information needed in the best interest of the juvenile and to allow for a reasonable time for the parties to conduct expeditious discovery. Otherwise, continuances shall be granted only in extraordinary circumstances when necessary for the

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proper administration of justice or in the best interest of the juvenile.

N.C.G.S. § 7A-632 (1989).

Nothing in the record indicates that the court requested or needed additional information in the best interests of Daniel, or that more time was needed for expeditious discovery. Therefore, the question is whether these facts support the conclusion that extraordinary circumstances necessitating a continuance are not present in this case. The evidence before the trial court was that Ms. Safriet, whose trailer burned down around 3 February 1992, had not contacted her attorney from 6 January 1992 until 19 February 1992, a period of 45 days, despite a 24 February 1992 hearing date set on 6 January 1992. Because these facts did not present extraordinary circumstances warranting a continuance, the trial court's decision to deny Ms. Safriet's motion for a continuance was not "manifestly unsupported by reason," and the trial court did not abuse its discretion in denying her motion.

II

[2] N.C. Gen. Stat. § 7A-517(21), in relevant part, as it read at the time of this trial, defined a neglected juvenile as:

[a] juvenile who does not receive proper care, supervision, or discipline from his parent, guardian, custodian, or caretaker;

N.C.G.S. § 7A-517(21) (1989). This statute was amended by the 1993 General Assembly; however, the above quoted portion of the statute was not altered. N.C.G.S. § 7A-517(21) (Supp. 1993). The statute is silent on whether the juvenile, to be neglected, must sustain some injury as a consequence of the failure to provide "proper care, supervision, or discipline." Nonetheless, this Court has consistently required that there be some physical, mental, or emotional impairment of the juvenile or a substantial risk of such impairment as a consequence of the failure to provide "proper care, supervision, or discipline." *In re Thompson*, 64 N.C. App. 95, 101, 306 S.E.2d 792, 796 (1983); see *In re Huber*, 57 N.C. App. 453, 458, 291 S.E.2d 916, 919, *disc. rev. denied*, 306 N.C. 557, 294 S.E.2d 223 (1982) (failure of the parent to provide treatment which could cause the juvenile to "suffer emotionally" sufficient to support neglect); *In re Evans*, 81 N.C. App. 449, 452, 344 S.E.2d 325, 328 (1986) (neglect where mother's inability to maintain secure living

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arrangements exposed child to substantial risk of physical injury in future); *In re Devone*, 86 N.C. App. 57, 60, 356 S.E.2d 389, 391 (1987) (parent's denial of mentally retarded child's right to attend special education classes critical to the child's development and welfare sufficient for neglect and lack of proper care). This is consistent with the authority of the State to regulate the parent's constitutional right to rear their children, *Meyer v. Nebraska*, 262 U.S. 390, 67 L. Ed. 1042 (1922), only when "it appears that parental decisions will jeopardize the health or safety of the child." *Wisconsin v. Yoder*, 406 U.S. 205, 233-34, 32 L. Ed. 2d 15, 35 (1972).

In this case, the findings of fact reveal that Ms. Safriet failed to provide proper care for Daniel in that she regularly left him at the School in a filthy condition, she refused to enroll him in the residential program so that he could learn proper hygiene skills, she and Daniel, at the time of the filing of the petition, resided in an extremely cluttered trailer with no electricity and several windows broken out, she had no permanent residence at the time of the hearing, she had only minimal contact with Daniel after his placement in the residential program, she failed to provide DSS or the School with information on how to reach her in an emergency, and she provided no care for her son since his placement with her parents.

Although the trial court failed to make any findings of fact concerning the detrimental effect of Ms. Safriet's improper care on Daniel's physical, mental, or emotional well-being, all the evidence supports such a finding. *See Harris v. N.C. Farm Bureau Mutual Ins. Co.*, 91 N.C. App. 147, 150, 370 S.E.2d 700, 702 (1988) (remand because of inadequate findings of fact unnecessary where facts are undisputed and only one inference can be drawn from undisputed facts). The findings of fact that Daniel was in a filthy condition, other children made fun of him due to his uncleanliness, Ms. Safriet is without a permanent residence, and Daniel's grandparents and the School do not know how to contact Ms. Safriet in case of an emergency show that Daniel's physical, emotional, or mental well-being was impaired or in substantial risk of becoming impaired as a result of improper care. The testimonies of Ms. Belbin and Daniel's grandmother support this conclusion. For these reasons, the trial court did not err in adjudicating Daniel as a neglected juvenile under Section 7A-517(21).

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III

In selecting an appropriate disposition, the trial court must "design an appropriate plan to meet the needs of the juvenile . . . [and] the initial approach should involve working with the juvenile and his family in their own home" N.C.G.S. § 7A-646 (1989). This record supports the determination by the trial judge that the needs of Daniel were best met in the School, that they could not be met at home, and that to insure his presence in the School, custody should be given, as specifically authorized in N.C. Gen. Stat. § 7A-647, to DSS.

For these reasons, the trial court did not err in denying Ms. Safriet's motion to continue, in adjudicating Daniel as a neglected juvenile, and in awarding custody to DSS.

Affirmed.

Judges MARTIN and JOHN concur.

WAKE COUNTY, EX REL. LISA KAYE HORTON, PLAINTIFF v. CHRISTOPHER
ANTONIO RYLES, DEFENDANT

No. 9210DC1012

(Filed 7 December 1993)

1. Appeal and Error § 178 (NCI4th)— appeal from motion to dismiss—interlocutory—jurisdiction of trial court—not divested

The trial court did not err in a child support case by proceeding to render a judgment on the merits after defendant had appealed from the denial of his motion to dismiss. The Court of Appeals has determined in an unpublished opinion that defendant's appeal did not affect a substantial right and was interlocutory; therefore, while the general rule is that an appeal removes the case from the jurisdiction of the trial court, the exception that an appeal from an interlocutory order which does not affect a substantial right is a nullity and does not divest the trial court of jurisdiction applies here.

Am Jur 2d, Appeal and Error §§ 352, 357.

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2. Parent and Child § 43 (NCI4th) — child support — summons — sufficient notice

The defendant had sufficient notice of a child support hearing and the court properly entered an order against him where no complaint or summons was issued as required by N.C.G.S. § 1A-1, Rules 3 and 4, but defendant had already signed an acknowledgment of paternity which met all the requirements of N.C.G.S. § 110-132(a). The trial court complied with the requirements of N.C.G.S. § 110-132(b), and the order to show cause, which was personally served on defendant, was signed by a judge, contained the name of the child born out of wedlock, the time, date, and place for defendant to appear to defend himself and show cause as to why the court should not enter an order for support against him, and counsel for defendant appeared at this hearing to represent defendant and was given the chance to present evidence on the issue of whether the trial court should enter a child support order against defendant.

Am Jur 2d, Parent and Child §§ 41-74.

3. Parent and Child § 38 (NCI4th) — child support — father who voluntarily acknowledges paternity — controlling statutory provision

The more specific provisions of Chapter 110 of the General Statutes dealing with the procedure for determining and enforcing support obligations of a father who voluntarily acknowledges paternity prevails over any conflicting procedure in Chapter 50 for determining and enforcing custody and support of minor children. N.C.G.S. § 110-132 deals specifically with orders for child support in actions where a putative father has signed an acknowledgement of paternity and this acknowledgement has become equivalent to an enforceable judicial determination. It is clear that the Legislature did not intend for Chapter 50 to control all actions for child support.

Am Jur 2d, Parent and Child §§ 41-74.

Appeal by defendant from order entered 10 July 1992 by Judge Russell G. Sherrill, III in Wake County District Court. Heard in the Court of Appeals 17 September 1993.

Nicholas DeVonne Horton was born to Plaintiff Lisa Kaye Horton (Horton) on 3 March 1987 out of wedlock. On 14 January

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1992, Horton signed an affirmation of paternity naming Defendant Christopher Antonio Ryles as the father of Nicholas. On 29 January 1992, Defendant Ryles signed an acknowledgment of paternity of Nicholas DeVonne Horton and a memorandum of understanding in which he acknowledged and voluntarily admitted that he is the father of Nicholas DeVonne Horton. Based on these documents, Judge Bullock entered an order of paternity against defendant on 24 February 1992 naming him as the father of Nicholas DeVonne Horton, which order was filed on 25 February 1992 in Wake County, the same day the documents signed by the parties were filed. Further, the deputy clerk of Wake County issued a certificate of paternity to notify the State Registrar of the judgment of paternity against defendant.

Subsequently, Katherine Skinner, the child support agent in this case, applied for a summons and order to show cause as to why the court should not enter an order for child support against defendant. Judge Overby issued this summons and order to show cause against defendant, and on 27 March 1992, defendant was served in person with this summons and order. On 4 May 1992, defendant filed a motion to dismiss the action for child support pursuant to N.C. R. Civ. P. 12(b) on the grounds that no civil action was properly commenced against him, that the court lacked personal jurisdiction over him, that defendant did not receive proper process and service of process, and that plaintiff's application failed to state a claim upon which relief can be granted.

On 28 May 1992, Judge Morelock signed an order denying defendant's motion to dismiss, giving defendant twenty days to further plead or respond to the order to show cause entered by Judge Overby and stating that the trial court retained jurisdiction for further orders in this action. Defendant appealed this order to the Court of Appeals. This Court held that defendant's appeal was interlocutory and dismissed his appeal in an unpublished opinion filed 5 October 1993.

On 8 June 1992, the Wake County Child Support Enforcement Agency filed a notice of hearing that it would bring on for hearing the application, summons, and order requiring defendant to show cause why an order for child support should not be entered against him. This hearing was held in Wake County District Court on 1 July 1992. On 10 July 1992, Judge Russell Sherrill, III entered an order in which he ordered defendant to pay \$340.00 per month

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to the clerk of superior court for the support of Nicholas Horton. From this order, defendant appeals.

Assistant Wake County Attorney Scott W. Warren for Appellee Wake County Child Support Enforcement Agency.

Anderson Rutherford Geil & Scherer, by Sally H. Scherer, for defendant-appellant.

ORR, Judge.

On appeal, defendant brings forward the following three assignments of error: (1) that the trial court erred in hearing plaintiff's claim for child support based on the argument that defendant's pending appeal of the trial court's denial of his motion to dismiss divested the trial court of jurisdiction in this action, (2) that the trial court erred in denying his motion to dismiss on the ground that the trial court lacked subject matter and personal jurisdiction over him because no complaint or summons had been issued, and (3) that the trial court erred in denying his motion to dismiss on the ground that the trial court's order to show cause failed to state a claim upon which relief could be granted. For the reasons stated below, we affirm the order of the trial court.

I.

[1] First, defendant contends that the trial court erred in proceeding to hear plaintiff's claim on the merits because the previous order denying defendant's motion to dismiss was on appeal. We disagree.

On 4 May 1992, defendant filed a motion to dismiss this action for child support pursuant to N.C. R. Civ. P. 12(b). On 28 May 1992, Judge Morelock signed an order denying defendant's motion to dismiss, giving defendant twenty days to further plead or respond to the order to show cause entered by Judge Overby and stating that the trial court retained jurisdiction for further orders in this action. After a hearing on the merits of this case and while defendant's appeal from the denial of his motion to dismiss was pending in this Court, Judge Russell Sherrill, III entered an order ordering defendant to pay \$340 a month for the support of Nicholas Horton.

Defendant argues that the trial court erred in proceeding to the merits of this case because his appeal from the denial of his

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motion to dismiss was pending in this Court. Defendant bases his argument on the general rule that an appeal removes the case from the jurisdiction of the trial court. *See State ex. rel. Utilities Commission v. Edmisten*, 291 N.C. 361, 230 S.E.2d 671 (1976); *See also Berger v. Berger*, 67 N.C. App. 591, 313 S.E.2d 825, *disc. review denied*, 311 N.C. 303, 317 S.E.2d 678 (1984). "The general rule, however, is subject to the exception . . . that an appeal from an interlocutory order not affecting a substantial right is a nullity and does not divest the trial court of jurisdiction." *Berger*, 67 N.C. App. at 597, 313 S.E.2d at 829.

On 5 October 1993, this Court filed an unpublished opinion in *Wake County ex rel. Horton v. Ryles*, (No. 9210DC837), 435 S.E.2d 582, concluding that defendant's appeal from the denial of his motion to dismiss did not affect a substantial right and dismissing his appeal as interlocutory. Thus the exception to the general rule that an appeal from an interlocutory order not affecting a substantial right is a nullity and does not divest the trial court of jurisdiction applies in the present case, and the trial court correctly proceeded in this action to render a judgment on the merits. *See Berger*, 67 N.C. App. at 597, 313 S.E.2d at 829.

II.

[2] Next, defendant contends that the trial court erred by denying his motion to dismiss because no complaint or summons was issued in this action as required by Rules 3 and 4 of the North Carolina Rules of Civil Procedure, and he was not, therefore, given the notice required to obtain jurisdiction. We disagree.

This action was conducted pursuant to the provisions of N.C. Gen. Stat. § 110-132. While this statute does not require the issuance of a summons and complaint to give the court the authority to enter an order for child support in a case where a judgment of paternity has been entered against a putative father based on his acknowledgment of paternity, the process by which a putative father is notified of the court's authority to enter child support against him under these circumstances is equivalent to the notice received from the issuance of a summons and complaint.

N.C. Gen. Stat. § 110-132(a) prescribes the procedure for entering judgment of paternity based upon the acknowledgment of paternity by the putative father. N.C. Gen. Stat. § 110-132(a) (1991) states:

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(a) In lieu of or in conclusion of any legal proceeding instituted to establish paternity, the written acknowledgment of paternity executed by the putative father of the dependent child when accompanied by a written affirmation of paternity executed and sworn to by the mother of the dependent child and filed with and approved by a judge of the district court in the county where the mother of the child resides or is found, or in the county where the putative father resides or is found, or in the county where the child resides or is found shall have the same force and effect as a judgment of that court

Thus, "[t]his statute, in effect, makes a father's voluntary written acknowledgment of paternity . . . a binding and fully enforceable substitute for a judicial determination of paternity" *Durham County Dep't of Social Services v. Williams*, 52 N.C. App. 112, 116, 277 S.E.2d 865, 868 (1981).

Further, once the acknowledgment of paternity becomes a binding and fully enforceable judicial determination of paternity, N.C. Gen. Stat. § 110-132(b) sets out the procedure by which the court may enter a support order on this acknowledgment. N.C. Gen. Stat. § 110-132(b) (1991) states:

(b) At any time after the filing with the district court of an acknowledgment of paternity, upon the application of any interested party, the court or any judge thereof shall cause a summons signed by him or by the clerk or assistant clerk of superior court, to be issued, requiring the putative father to appear in court at a time and place named therein, to show cause, if any he has, why the court should not enter an order for the support of the child by periodic payments, which order may include provision for reimbursement for medical expenses incident to the pregnancy and the birth of the child, accrued maintenance and reasonable expense of the action under this subsection on the acknowledgment of paternity previously filed with said court. The amount of child support payments so ordered shall be determined as provided in G.S. 50-13.4(c). The prior judgment as to paternity shall be res judicata as to that issue and shall not be reconsidered by the court.

Thus, three requirements must be met to enter an order for child support "on the acknowledgment of paternity": (1) the putative father's acknowledgment of paternity must be filed, (2) an interested

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party must make an application for an order to show cause, and (3) the court or any judge thereof must cause a summons signed by him or by the clerk or assistant clerk of superior court to be issued requiring the putative father to appear in court at a time and place named in the order to show cause why the court should not enter an order for support of the child. Thus, the putative father has the right to a hearing before the court enters a child support order on his acknowledgment of paternity, and the court must give him notice of this hearing. We conclude that these requirements provide sufficient notice to a putative father who has had a judgment of paternity entered against him pursuant to N.C. Gen. Stat. § 110-132(a) for the court to enter an order for child support on this judgment.

It is undisputed that the trial court in the present case complied with the requirements of N.C. Gen. Stat. § 110-132(b). Further, the application and order to show cause, which was personally served on defendant stated:

You are Summoned and Notified to appear at the place, date and time set out below to defend yourself in this action and show cause, if any, why the Court should not enter an Order for the care and support of the dependent child or children named above.

This order was signed by Judge Overby, it contained the name of the child born out of wedlock, Nicholas DeVonne Horton, and the time, date, and place for when and where defendant was to appear to defend himself and show cause as to why the court should not enter an order for support against him. Counsel for defendant appeared at this hearing to represent defendant and was given the chance to present evidence on the issue of whether the trial court should enter a child support order against defendant.

Further, defendant had already signed an acknowledgment of paternity as to Nicholas DeVonne Horton, and such acknowledgment met all the requirements of N.C. Gen. Stat. § 110-132(a) so that it was equivalent to a judicial determination of paternity. We conclude, based on these facts, that defendant had sufficient notice and that the court properly entered the order for child support against him.

[3] Defendant also argues that N.C. Gen. Stat. § 110-132(b) cannot be interpreted as providing an alternative procedure for collecting

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child support because it would conflict with Chapter 50, which already establishes this action. We disagree.

Our Supreme Court stated in *National Food Stores v. North Carolina Bd. of Alcoholic Control*, 268 N.C. 624, 628-29, 151 S.E.2d 582, 586 (1966) (citation omitted):

“Where there is one statute dealing with a subject in general and comprehensive terms, and another dealing with a part of the same subject in a more minute and definite way, the two should be read together and harmonized, if possible, with a view to giving effect to a consistent legislative policy; but, to the extent of any necessary repugnancy between them, the special statute, or the one dealing with the common subject matter in a minute way, will prevail over the general statute, according to the authorities on the question, unless it appears that the legislature intended to make the general act controlling; and this is true *a fortiori* when the special act is later in point of time, although the rule is applicable without regard to the respective dates of passage.”

Chapter 50 is entitled “Divorce and Alimony”, and Article 1 of this Chapter is entitled “Divorce, Alimony, and Child Support, Generally.” N.C. Gen. Stat. § 50-13.4 provides for an action for support of a minor child, and N.C. Gen. Stat. § 50-13.5 prescribes the procedure for instituting such an action. These actions may be instituted by

[a]ny parent, or any person, agency, organization or institution having custody of a minor child, or bringing an action or proceeding for the custody of such child, or a minor child by his guardian

N.C. Gen. Stat. § 50-13.4 (1993 Cum. Supp.).

Chapter 110 is entitled “Child Welfare”, and Article 9 of this Chapter is entitled “Child Support.” This Chapter deals with child welfare issues, and Article 9 provides for the determination and enforcement of child support in that context. N.C. Gen. Stat. § 110-132 deals specifically with orders for child support in actions where a putative father has signed an acknowledgement of paternity, and this acknowledgement has become equivalent to an enforceable judicial determination.

It is clear that the Legislature did not intend for Chapter 50 to control all actions for child support. Reading Chapter 50

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together with Chapter 110, we hold that the more specific provisions of Chapter 110 dealing with the procedure for determining and enforcing support obligations of a father who voluntarily acknowledges paternity prevails over any conflicting procedure in Chapter 50 for determining and enforcing custody and support of minor children. Accordingly, defendant's argument is without merit.

III.

Defendant's final assignment of error deals with the denial of his motion to dismiss pursuant to Rule 12(b)(6) for failure to state a claim upon which relief can be granted. Defendant's support for this assignment of error rests with his contention that Chapter 50 governs all child support actions and that this Chapter requires certain pleadings to be made, which pleadings were not made in the present case. Based on our holding above, we find no merit to defendant's argument.

Accordingly, we affirm the order of the trial court.

Affirmed.

Judges EAGLES and GREENE concur.

THE NORTH CAROLINA RAILROAD COMPANY, PLAINTIFF v. CITY OF
CHARLOTTE AND NORFOLK SOUTHERN RAILWAY COMPANY,
DEFENDANTS

No. 9226SC916

(Filed 7 December 1993)

**1. Appeal and Error § 112 (NCI4th)— interlocutory appeal—
subject matter jurisdiction—appealable**

The denial of a motion to dismiss for lack of subject matter jurisdiction was appealable. N.C.G.S. § 1-277(b) allows a defendant a means of immediate appellate determination as to whether the trial court has jurisdiction.

Am Jur 2d, Appeal and Error §§ 47 et seq.

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2. Courts § 132 (NCI4th)— land no longer used as railroad— construction of lease, deed, and contract—state jurisdiction

The trial court did not err by denying Norfolk Southern's motion to dismiss an action arising from a lease with the North Carolina Railroad Company where Norfolk Southern contended that Norfolk Southern's duty to provide interstate rail service on its lines was subject to the exclusive jurisdiction of the ICC, but this case turns on state law construction of written instruments, specifically a lease, a deed, and a contract, while the ICC ruling applies to the abandonment of the railroad.

Am Jur 2d, Courts §§ 107-110.

3. Appeal and Error § 121 (NCI4th)— summary judgment— multiple parties or multiple claims—not certified for appeal—interlocutory

Plaintiff's cross-appeal from a partial summary judgment was interlocutory and not appealable where the judgment was in a multiple claim or multiple party action, was final as to one or more of the claims but not certified for appeal by the trial court, and was not authorized by some other rule or statute. N.C.G.S. § 1A-1, Rule 54(b).

Am Jur 2d, Appeal and Error § 104.

Plaintiff, The North Carolina Railroad Company, and defendant Norfolk Southern Railway Company, appeal from order entered 19 May 1992 by Judge Claude S. Sitton in Mecklenburg County Superior Court. Heard in the Court of Appeals 2 September 1993.

Maupin Taylor Ellis & Adams, P. A., by Gilbert C. Laite, III, and Petree Stockton, by David B. Hamilton, for plaintiff/ cross-appellant/appellee The North Carolina Railroad Company.

Jones, Hewson & Woolard, by Harry C. Hewson, and Brooks, Pierce, McLendon, Humphrey & Leonard, by Lennox P. McLendon, Jr., and James R. Saintsing, for defendant/ appellant/cross-appellee Norfolk Southern Railway Company.

Office of the City Attorney, by Catherine Cooper Williamson, and Laura A. Kratt, for defendant/cross-appellee City of Charlotte.

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JOHNSON, Judge.

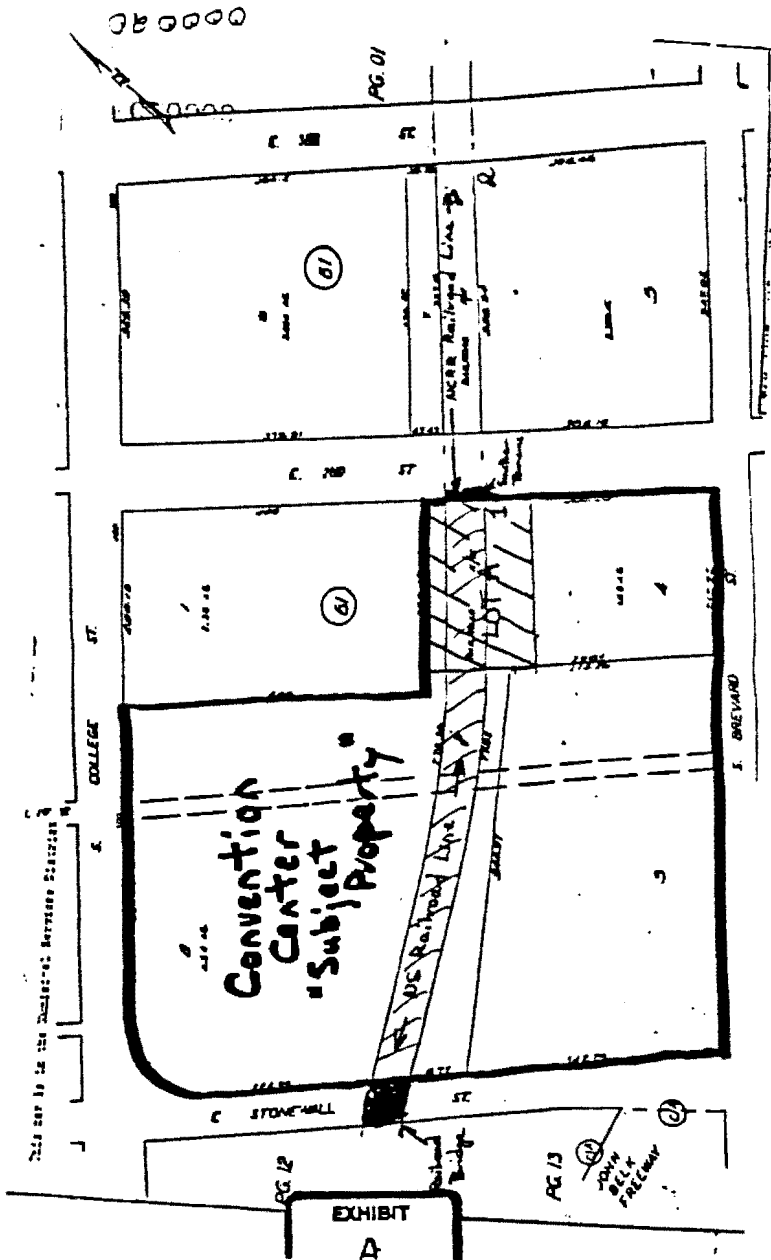
This action centers around a right of way dispute between two railroad companies, The North Carolina Railroad Company (NCR) and Norfolk Southern Railway Company (NS¹), as to a tract of land in downtown Charlotte, North Carolina. The facts pertinent to this appeal are as follows:

NCR owns a railroad line which runs across North Carolina, from Morehead City westward to a southern terminus point in downtown Charlotte. At this southern terminus point, NCR's railroad line is connected and has connected to the railroad line and corridor owned by NS since the turn of the century. NS' line continues south from that point through the remainder of Charlotte and to points beyond as an interstate railroad line. These two lines connected on a small parcel of land (Lot A) owned jointly by NCR and NS as tenants in common on the south side of Second Street in downtown Charlotte. Lot A bordered a larger tract of land owned by NS (this larger tract is referred to as the Subject Property). NS' right of way extends southward from Lot A, through the Subject Property.

1. NS refers to both Norfolk Southern and its predecessor, Southern Railway.

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In a document executed in 1895, NCRR leased certain properties to NS for a ninety-nine year period (until 1994). In 1968, the parties executed a new lease agreement pertaining to several of the parcels covered in the 1895 agreement located north of the Subject Property and Lot A. This new lease contained an exception of a forty-foot strip as a right of way for two railroad tracks, and pursuant to the terms of the exception, NS had a surveyor locate this forty-foot strip and it was recorded in the Mecklenburg Registry on 23 December 1971 on a plat entitled "Southern Railway Right of Way."

By the terms of the 1968 lease, NCRR conveyed all of its undivided interest in Lot A to NS by general warranty deed without reservation or condition.

In 1990, NS and the City of Charlotte (City) entered into an agreement for NS to sell the Subject Property to the City as the City planned to build a convention center on the Subject Property. In 1991, the parties amended their agreement to provide that NS seek Interstate Commerce Commission (ICC) approval for abandonment of its line of railroad on the Subject Property. NS filed this notice with the ICC; the ICC responded affirmatively on 16 July 1991, stating the exemption would become effective 30 August 1991.

As a result of this decision, NCRR filed a petition with the ICC, dated 10 December 1991, asking the ICC to reopen consideration of its decision allowing NS to abandon the rail line on the Subject Property. NS filed timely response opposing this petition, and the ICC rendered its decision on 18 February 1992, effective 24 February 1992, denying NCRR's petition.

Also on 10 December 1991, plaintiff NCRR filed a complaint for declaratory judgment in this action in Mecklenburg County Superior Court and served defendants NS and City on 11 December 1991. NS obtained an extension of time to respond, and then filed and served its answer and counterclaim; the City also filed its answer. NS' and the City's answers included motions to dismiss under N.C.R. Civ. P. 12(b)(1) and 12(b)(6).

NS filed a motion for summary judgment against NCRR on 2 March 1992. NCRR filed a motion to dismiss NS' counterclaim under N.C.R. Civ. P. 12(b)(6) on 9 March 1992. City filed a motion

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for judgment on the pleadings under N.C.R. Civ. P. 12(c) and for summary judgment against NCRR on 22 April 1992.

On 22 April 1992, NS filed a motion for leave to amend its answer and counterclaim, to allege the affirmative defenses of res judicata and/or collateral estoppel.

On 4 May 1992, during the motions session of the action, NS contended in open court that the ICC had exclusive subject matter jurisdiction over the NCRR's claims against NS. A motion by NCRR to stay the hearing pending completion of discovery was denied.

The order entered on 19 May 1992 contained the following rulings: a denial of the City's motion for judgment on the pleadings; a denial of NS' motion to dismiss for lack of subject matter jurisdiction; a denial of NS' and the City's motions to dismiss for failure to state a claim under N.C.R. Civ. P. 12(b)(6); a denial of NS' and the City's motions for summary judgment as to counts 1, 3, 6 and 7 of the complaint; the granting of NS' and the City's motions for summary judgment as to counts 2, 4, 5 and 8 of the complaint; a denial of NCRR's motion to dismiss NS' counterclaim under N.C.R. Civ. P. 12(b)(6); and a denial of NCRR's motion for leave to amend its answer and counterclaim to allege res judicata and/or collateral estoppel.

NS filed notice of appeal on 26 June 1992, and NCRR filed its notice of cross-appeal on 9 July 1992.

[1] NS first assigns that the trial court erred in denying NS' motion to dismiss for lack of subject matter jurisdiction. NS argues initially that this interlocutory appeal is proper under North Carolina General Statutes § 1-277 (1983). This statute states:

(a) An appeal may be taken from every judicial order or determination of a judge of a superior or district court, upon or involving a matter of law or legal inference, whether made in or out of session, which affects a substantial right claimed in any action or proceeding; or which in effect determines the action, and prevents a judgment from which an appeal might be taken; or discontinues the action, or grants or refuses a new trial.

(b) Any interested party shall have the right of immediate appeal from an adverse ruling as to the jurisdiction of the court over the person or property of the defendant or such

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party may preserve his exception for determination upon any subsequent appeal in the cause.

NS argues that the trial court improperly assumed jurisdiction over property of NS, and that “[u]nder N.C.G.S. § 1-277(b), it is clearly proper for this Court to consider an appeal from denial of a motion to dismiss, when the motion deals with jurisdiction over property of the appellant.” NS further argues that “[t]he trial court’s decision also affects a substantial right of NS: the right not to be forced to go to trial when jurisdiction assumed over NS in state court was a nullity. Therefore, immediate appeal is also proper under N.C.G.S. § 1-277(a).”

Our Court has stated that “[North Carolina General Statutes § 1-277(b)] simply allows a defendant, in an action of this nature, a means of immediate appellate determination as to whether the trial court has jurisdiction so that it can then proceed to answer the questions raised by the lawsuit.” *Holt v. Holt*, 41 N.C. App. 344, 348, 255 S.E.2d 407, 410 (1979). We find that the denial of NS’ motion to dismiss for lack of subject matter jurisdiction is properly appealable.

[2] NS argues that “[t]he court below erroneously assumed jurisdiction over NS’s property south of the Subject Property. . . . NS’s duty to provide interstate rail service on its lines is subject to exclusive jurisdiction of the ICC.” NS argues that it is well-established “that the ICC’s authority to regulate trackage rights affecting interstate commerce preempts state regulation.” NS directs this Court’s attention to cases specifically involving claims which involve state jurisdiction over physical joining of lines, use of an interstate trackage and abandonment of existing lines.

The cases which NS cites, however, are distinguishable from the facts in the instant case. The instant case turns on state law construction of written instruments, specifically the language of the 1968 lease, the 1968 deed and the 1990 contract herein, while the ICC ruling applies to the abandonment of the railroad. We therefore find that the trial court did not err in denying NS’ motion to dismiss for lack of subject matter jurisdiction.

NS’ next two assignments of error are that (1) the trial court abused its discretion in denying NS leave to amend its answer and counterclaim as to the preclusive effect of the ICC decision, and (2) the trial court erred in denying NS’ motion to dismiss

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pursuant to N.C.R. Civ. P. 12(b)(6), because the ICC's decision of 18 February 1992 precludes state court determination of the claims raised in the complaint against NS. For reasons set out in our previous discussion, we need not address these assignments of error.

[3] NCRR cross-appeals and argues that the trial court erred by granting defendant NS' motions for summary judgment on counts 2, 4, 5, and 8 of the complaint. In determining whether we may properly hear NCRR's cross-appeal, we turn to N.C.R. Civ. P. 54(b):

Judgment upon multiple claims or involving multiple parties.— When more than one claim for relief is presented in an action, whether as a claim, counterclaim, crossclaim, or third-party claim, or when multiple parties are involved, the court may enter a final judgment as to one or more but fewer than all of the claims or parties only if there is no just reason for delay and it is so determined in the judgment. Such judgment shall then be subject to review by appeal or as otherwise provided by these rules or other statutes. *In the absence of entry of such a final judgment, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties and shall not then be subject to review either by appeal or otherwise except as expressly provided by these rules or other statutes.* Similarly, in the absence of entry of such a final judgment, any order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties. (Emphasis added.)

In order for a judgment in a multiple claim or multiple party action to be immediately appealable, the judgment must be (1) in effect final as to one or more of the claims or parties; and (2) certified for appeal by the trial judge. If the judgment is final as to one or more of the claims or parties but has not been certified for appeal by the trial court, no appeal will lie unless an immediate appeal is authorized by some other rule or statute, such as North Carolina General Statutes § 1-277 or North Carolina General Statutes § 7A-27 (1989). *Leasing Corp. v. Myers*, 46 N.C. App. 162, 265 S.E.2d 240, *disc. review allowed and appeal dismissed*, 301 N.C. 92 (1980).

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Therefore, the judgment herein, as a multiple claim or multiple party action, and final as to one or more of the claims or parties but not certified for appeal by the trial court, is not appealable unless an immediate appeal is authorized by some other rule or statute. Finding no immediate appeal authorized by some other rule or statute, and noting that counts 1, 3, 6 and 7 of NCRR's complaint remain, we find NCRR's cross-appeal interlocutory.

We affirm the trial court's decision denying NS' motion to dismiss for lack of subject matter jurisdiction. We dismiss NCRR's cross-appeal as it is interlocutory.

Judges WYNN and JOHN concur.

STATE OF NORTH CAROLINA v. ANGELA PINION TIDWELL

No. 9319SC221

(Filed 7 December 1993)

1. Homicide § 523 (NCI4th) — second-degree murder — threats — reconciliation — malice

The trial court erred in a second-degree murder prosecution by not giving defendant's requested instruction that the jury could find from the evidence that defendant had reconciled with the victim and that, if they did so, any malice shown by defendant's previous threats could no longer be attributed to the killing.

Am Jur 2d, Homicide § 500.

2. Homicide § 365 (NCI4th) — murder — struggle to prevent suicide — gun discharged — instruction on involuntary manslaughter refused — error

The trial court erred in a second-degree murder prosecution by refusing defendant's request to instruct the jury on involuntary manslaughter where defendant testified that the victim was killed when she reached for the pistol in an attempt to prevent the victim from committing suicide. The North Carolina Supreme Court has consistently held that the trial court should charge on involuntary manslaughter where there

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is evidence that the victim was unintentionally killed with a deadly weapon during a physical struggle with defendant.

Am Jur 2d, Homicide §§ 425 et seq.

Appeal by defendant from judgment entered 17 July 1992 by Judge F. Fetzer Mills in Rowan County Superior Court. Heard in the Court of Appeals 19 October 1993.

Defendant was tried upon a proper bill of indictment charging her with the murder of her husband, Mark A. Tidwell. The State's evidence tended to show that defendant and the victim were married in 1981 and that by 1989, two daughters were born of the marriage. The victim was a skilled construction worker and defendant was a homemaker.

In 1989, defendant met a man named Michael Ragan. During the subsequent three years, the marriage of defendant and the victim deteriorated and defendant left the marital home on several occasions to live with Ragan. After living with Ragan for some time, defendant would return to live with the victim. At the time of the murder, defendant and the victim were living together in the marital home with their two children.

The State presented substantial evidence that during times of marital discord between defendant and the victim, defendant threatened the life of the victim. At times defendant stated that she wished the victim was dead or that she wanted him to die. On other occasions she asked friends and acquaintances if they knew of anyone who would kill her husband for her. She also stated that she would pay someone \$10,000 to kill her husband, and that if no one would kill her husband for her, she would do so herself by shooting the victim in the head and making it appear as if the shooting was accidental. Defendant indicated on numerous occasions that she wanted her husband to die or be killed so that she would receive the proceeds from his life insurance policies.

On 1 September 1991, the victim was killed by a single gunshot wound to the head. The fatal shot was fired from a two-shot .45 caliber Derringer pistol owned by the victim. The State's evidence tended to show that defendant shot the victim while he was asleep, or in an alcohol and drug induced stupor and that she thereafter placed the pistol in the victim's hand in an effort to create the appearance that he had committed suicide.

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Defendant testified that on the night of the shooting the victim was emotionally upset because he did not believe that defendant loved him, and that he threatened to kill himself. After returning home with defendant from a bar, the victim took the gun from the drawer where it was stored and held it to his head. Defendant testified that she attempted to take the gun away from the victim as he held the gun to his head, but that when she did so the gun discharged, shooting the victim in the head.

The jury found defendant guilty of second degree murder and the trial court sentenced her to life imprisonment. Defendant appealed.

Attorney General Michael F. Easley, by Assistant Attorney General Valerie B. Spalding, for the State.

Appellate Defender Malcolm Ray Hunter, Jr., by Assistant Appellate Defender Daniel R. Pollitt, for defendant-appellant.

MARTIN, Judge.

Defendant contends that she is entitled to a new trial due to (1) repeated instances of alleged prosecutorial misconduct, (2) denial of her right to effective assistance of counsel, (3) the trial court's refusal to give a requested jury instruction, and (4) the court's failure to submit the lesser offense of involuntary manslaughter as a possible verdict. Defendant's latter two contentions have merit and we conclude that she is entitled to a new trial. We do not address her other contentions because they concern matters which may not arise at a new trial.

[1] Defendant requested the following instruction:

Prior Threats and Reconciliation — Evidence has been received with regard to prior threats by defendant against the life of the deceased. If you believe all or any part of this evidence, this would tend to show express malice on the part of the defendant; but if you so find, then you should consider evidence offered by the defendant tending to show a reconciliation on the part of the defendant, and that the defendant was living with the deceased as man and wife; and if you should so find from the evidence that they were reconciled, then the killing would no longer be attributed to the previous malice, but to some other reason, as raised by the evidence of the State or defendant.

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It is well established that when a defendant requests a special instruction which is correct in law and supported by the evidence, the trial court must give the requested instruction, at least in substance. *State v. Lamb*, 321 N.C. 633, 365 S.E.2d 600 (1988); *State v. Hooker*, 243 N.C. 429, 90 S.E.2d 690 (1956). Refusal to give a requested instruction which is a correct statement of the law and which is supported by the evidence constitutes reversible error. *State v. Spicer*, 285 N.C. 274, 204 S.E.2d 641 (1974).

The instruction requested by defendant is a correct statement of the law. *State v. Horn*, 116 N.C. 1037, 21 S.E. 694 (1895). In *Horn*, the defendant was charged with murder. The State's evidence tended to show that during the days prior to the killing, the defendant and the victim had been on unfriendly terms and that the defendant had repeatedly threatened to kill the victim. However, the defendant presented evidence which tended to show that on the day of the killing the defendant and the victim had been friendly toward one another and that the defendant had intentionally avoided any confrontation with the victim. Based on the foregoing evidence, the defendant requested the court to instruct the jury that the malice which could be inferred from previous threats might be rebutted by evidence of a subsequent reconciliation. The trial court refused to give the requested instruction. On appeal, the Supreme Court ordered a new trial, holding that the trial court should have charged the jury that:

[I]f the defendant did make the threats . . . this would tend to show express malice on the part of the defendant. But if they should so find, then they should consider the evidence offered by the defendant tending to show a reconciliation on the part of the defendant, and that defendant after the threats was friendly with the deceased. And that if they should find from the evidence that he was, then the law no longer attributed the killing to previous malice, but inferred it was from the new and sudden provocation.

Horn, 116 N.C. at 1045-46, 21 S.E. at 695; *See also, State v. Barnwell*, 80 N.C. 466 (1879). The State does not contend that the decision in *Horn* has been overruled and we are aware of no case affecting the rule set forth therein. Thus, we are bound to hold that defendant's requested instruction is a correct statement of the law. If the instruction was supported by the evidence, it was error to refuse to give it.

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Our review of the record discloses that the requested instruction was supported by the evidence. Although defendant admitted having an extramarital affair with Michael Ragan, she testified that at the time of her husband's death, she was no longer involved with Ragan. She had been living with her husband for seven or eight weeks at the time of his death and they had resumed intimate marital relations. She testified that she loved the victim and that she was attempting to mend the damage done to their marriage by her past infidelities. If believed by a jury, this evidence could support a finding that although defendant had previously threatened the victim, at the time of the killing she had reconciled with him.

Based on the precedent of *Horn*, we hold that the trial court erred by refusing to instruct the jury that they could find from the evidence that defendant had reconciled with the victim, and that if they did so find, any malice shown by defendant's previous threats could no longer be attributed to the killing. *Horn*, 116 N.C. at 1045-46, 21 S.E. at 695. The trial court's refusal to give defendant's requested instruction entitles her to a new trial. *State v. Bailey*, 254 N.C. 380, 119 S.E.2d 165 (1961).

[2] Defendant also assigns as error the trial court's refusal to submit to the jury the issue of defendant's guilt of the lesser included offense of involuntary manslaughter. "Involuntary manslaughter has been defined as the unlawful and unintentional killing of another human being, without malice, which proximately results from an unlawful act not amounting to a felony . . . or from an act or omission constituting culpable negligence." *State v. Wallace*, 309 N.C. 141, 145, 305 S.E.2d 548, 551 (1983). Defendant contends that submission of involuntary manslaughter as a possible verdict was supported by the evidence.

Clearly there was no evidence that defendant killed the victim while engaged in an unlawful act not amounting to a felony. Therefore, to support a charge on involuntary manslaughter there must have been evidence from which the jury could find that defendant killed the victim while engaged in an act or omission constituting culpable negligence. "Culpable negligence" is defined as an act or omission evidencing a disregard for human rights and safety. *State v. Wilkerson*, 295 N.C. 559, 579-80, 247 S.E.2d 905, 916-17 (1978). The only evidence from which such negligence could be found was defendant's testimony that the victim was killed

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when she reached for the pistol in an attempt to prevent the victim from committing suicide. We must decide whether such an act can constitute culpable negligence.

This Court has addressed the identical issue in two previous cases. In *State v. Crisp*, 64 N.C. App. 493, 307 S.E.2d 776 (1983), there was evidence that the victim was killed when the defendant reached for, or grabbed at a rifle which the victim was pointing at himself. This Court, relying on *State v. Lindsay*, 45 N.C. App. 514, 263 S.E.2d 364 (1980), held that the foregoing evidence failed to establish that the defendant's actions were wanton, reckless, or culpable and that the trial court erred by submitting involuntary manslaughter as a possible verdict. *Crisp*, 64 N.C. App. at 497, 307 S.E.2d at 779.

In *State v. Stanley*, 56 N.C. App. 109, 286 S.E.2d 865 (1982), the defendant testified that the victim, her boyfriend, threatened to shoot himself in the head because he believed that the defendant no longer loved him. As the victim held a pistol to his head, the defendant attempted to seize control of the gun. During the resulting struggle, the gun discharged and killed the victim. This Court held that this evidence was sufficient to show a wanton and reckless use of a firearm by the defendant and that the defendant was therefore not entitled to relief from her conviction for involuntary manslaughter.

The State contends that *State v. Ataei-Kachuei*, 68 N.C. App. 209, 314 S.E.2d 751, *disc. review denied*, 311 N.C. 763, 321 S.E.2d 146 (1984) constitutes additional authority for not submitting involuntary manslaughter under the facts of this case. We have reviewed the decision in *Ataei-Kachuei* and found it to be inapplicable to the present case on the ground that all of the evidence in that case showed that the defendant intentionally shot the victim.

Clearly there exists a conflict in our decisions regarding the propriety of submitting to the jury the issue of a defendant's guilt of involuntary manslaughter where there is evidence that the killing was unintentional and occurred when the defendant attempted to prevent the victim from committing suicide. We believe, however, that the issue has been resolved by our Supreme Court which has consistently held that where there is evidence that the victim was unintentionally killed with a deadly weapon during a physical struggle with the defendant, the trial court should charge the jury on the offense of involuntary manslaughter.

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In *State v. Lytton*, 319 N.C. 422, 355 S.E.2d 485 (1987), the defendant's evidence tended to show that he and the victim engaged in an oral dispute. The defendant then fired his pistol at the ground as a warning to the victim to keep his distance. The victim did not heed the warning and continued to approach the defendant. A struggle ensued during which the victim was shot twice. The defendant did not aim the gun, pull the trigger or intend to shoot the victim. The Court held that this evidence required the trial court to give the defendant's requested instruction on involuntary manslaughter.

In *State v. Buck*, 310 N.C. 602, 313 S.E.2d 550 (1984), the defendant's evidence tended to show that the victim initially approached the defendant wielding a pocketknife. The defendant was frightened and obtained a knife from a nearby countertop. A struggle between the two armed men ensued during which the defendant unintentionally stabbed and killed the victim. The Court held that this evidence was sufficient to warrant submission of a possible verdict of involuntary manslaughter.

In *State v. Wallace*, 309 N.C. 141, 305 S.E.2d 548 (1983), the defendant's evidence tended to show that he and the victim were arguing when the victim reached for a gun laying on the bedroom dresser. Defendant grabbed the gun from under the victim's hand and was attempting to throw the gun across the room when it discharged and killed the victim. The Court held that the jury could have found that the defendant acted with culpable negligence from the manner in which he handled the cocked and loaded pistol, "*even under the circumstances as he described them.*" (Emphasis added.) *Id.* at 146, 305 S.E.2d at 551. The Court noted that:

[W]ith few exceptions, it may be said that every unintentional killing of a human being proximately caused by a wanton or reckless use of firearms, in the absence of intent to discharge the weapon or . . . under circumstances not evidencing a heart devoid of a sense of social duty, is involuntary manslaughter.

Id. at 146, 305 S.E.2d at 551-52 (quoting, *State v. Foust*, 258 N.C. 453, 459, 128 S.E.2d 889, 893 (1963)).

Based on the foregoing decisions of our Supreme Court, we are bound to hold, even under the circumstances as described by defendant, that the trial court erred by refusing defendant's request to instruct the jury on the offense of involuntary manslaughter.

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New Trial.

Judges GREENE and JOHN concur.

STATE OF NORTH CAROLINA v. ANTONIO DEMETRIUS WILSON, DEFENDANT

No. 9326SC46

(Filed 7 December 1993)

1. Searches and Seizures § 82 (NCI4th)— warrantless search and seizure of defendant—reasonable suspicion by police officer—pat-down search proper

An officer had reasonable suspicion to seize defendant and to perform a pat-down search where the officer was in the area because police had received an anonymous phone call that individuals were dealing drugs at an apartment complex; the police were familiar with the area and knew that when a squad car entered the parking lot at one end of the breezeway, the suspects would run out the other end; when the officer's squad car pulled into the parking lot, defendant and several other individuals attempted to flee the scene; and the officer testified that as a seven-year veteran of the force, it was his experience that weapons were frequently involved in drug transactions.

Am Jur 2d, Searches and Seizures §§ 42, 43.**2. Searches and Seizures § 58 (NCI4th)— pat-down search—contraband felt—"plain feel" doctrine—nature of contraband immediately apparent to officer**

An officer's search of defendant was no more intrusive than was necessary to assure himself that defendant was not dangerous where the officer was called to the scene to investigate alleged drug dealings; the officer had made prior drug arrests in his seven years of service; the officer was in the midst of a weapons search when he felt the contraband; upon using his tactile senses, the officer had probable cause to believe that the contraband in defendant's pocket was co-

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caine; and the character of the substance was immediately apparent to the officer.

Am Jur 2d, Searches and Seizures §§ 88, 103.

Appeal by defendant from order entered in open court on 3 August 1992 by Judge Marcus Johnson in Mecklenburg County Superior Court. Heard in the Court of Appeals 5 October 1993.

Attorney General Michael F. Easley, by Associate Attorney General E. Lee Turner, Jr., for the State.

Harold J. Bender, for defendant-appellant.

LEWIS, Judge.

The evidence presented below shows that on the evening of 2 March 1991, the Charlotte Police Department received an anonymous phone call that several individuals were dealing drugs in the breezeway of Building 1304 at the Hunter Oaks Apartments. The caller provided no specifics as to the names of the individuals nor did the caller give a description of the alleged drug dealers. Officer Faulkenberry and Officer J.M. Cherry were originally dispatched to the scene. The police were familiar with the area and knew that when a squad car entered the parking lot at one end of the breezeway the suspects would run out the other end. A plan was thus devised where one patrol car would enter the parking lot and Officer Faulkenberry and Officer Cherry would position themselves so that they could apprehend anyone who ran out the back of the breezeway.

One of the suspects who ran out the back of the breezeway was defendant. Officer Faulkenberry stopped him and performed a protective frisk of defendant's outer clothing. While performing his protective frisk, Officer Faulkenberry felt a lump in the left breast pocket of defendant's jacket and he immediately opined that it was crack cocaine. Officer Faulkenberry then asked defendant if his coat had an inside pocket. Defendant made no verbal response, but instead opened his jacket so that the inside pocket was visible. Officer Faulkenberry testified that once defendant opened his jacket he saw a small plastic bag which he then removed. The contents of the plastic bag proved to be crack cocaine.

Defendant was arrested and charged with possession with intent to sell and deliver cocaine. At trial defendant filed a motion

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to suppress and an accompanying affidavit giving his version of Officer Faulkenberry's search. The trial court denied defendant's motion to suppress and defendant thereafter entered a plea of guilty. Defendant now appeals.

[1] There are two separate issues before this Court: (I) Whether Officer Faulkenberry had a reasonable suspicion to justify his stop of defendant, and (II) Whether Officer Faulkenberry's frisk of defendant was more intrusive than necessary. As to the first issue defendant argues that the facts of this case are identical to those in *State v. Fleming*, 106 N.C. App. 165, 415 S.E.2d 782 (1992), where this Court held that reasonable suspicion did not exist. We do not agree. In *Fleming* this Court stated that: "A brief investigative stop of an individual must be based on specific and articulable facts as well as inferences from those facts, viewing the circumstances surrounding the seizure through the eyes of a reasonable cautious police officer on the scene, guided by his experience and training." *Id.* at 169, 415 S.E.2d at 785 (citations omitted). This Court further held that there was no reasonable suspicion because the officers seized a defendant who had merely been standing in an open area between two apartment buildings and then chose to walk in a direction away from the officers. The *Fleming* Court determined that the officers had only a generalized suspicion based on the time, place and the fact that defendant was unfamiliar to the area, and that if a generalized suspicion was enough then innocent citizens could be subjected to unreasonable searches at an officer's whim. *Id.* at 171, 415 S.E.2d at 785-86.

In the present case we find that Officer Faulkenberry had much more than a generalized suspicion. Officer Faulkenberry was in the area because the police had received an anonymous phone call that individuals were dealing drugs at the apartment complex. Further, when the squad car pulled into the parking lot, defendant and several other individuals attempted to flee the scene. Officer Faulkenberry also testified that as a seven year veteran of the force, it was his experience that weapons were frequently involved in drug transactions. We find that when these factors are considered as a whole and from the point of view of a reasonably cautious officer present on the scene, Officer Faulkenberry had reasonable suspicion to seize defendant and to perform a pat down search.

[2] We next address the question of whether or not Officer Faulkenberry's search of defendant was more intrusive than was

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necessary to assure himself that defendant was not dangerous. Since the filing of the briefs in this case, the United States Supreme Court decided the factually similar case of *Minnesota v. Dickerson*, 113 S.Ct. 2130, 124 L. Ed. 2d 334 (1993). In *Dickerson*, a police officer stopped a suspect and performed a routine pat down search. Although the search revealed no weapons, the officer became curious about a small lump in the front pocket of the defendant's jacket. The officer testified "I examined it with my fingers and it slid and it felt to be a lump of crack cocaine in cellophane." *Id.* Believing the lump to be cocaine the officer reached into defendant's pocket and retrieved a small cellophane bag, confirming his suspicion.

On appeal, the Supreme Court addressed the narrow question of whether or not an officer may seize nonthreatening contraband detected during a pat down search. The Supreme Court held that such was permissible as long as the officer's search was within the bounds established by *Terry v. Ohio*, 392 U.S. 1, 20 L. Ed. 2d 889 (1968). Supplying the rationale for its decision, the Supreme Court stated that:

[i]f a police officer lawfully pats down a suspect's outer clothing and feels an object whose contour or mass makes its identity immediately apparent, there has been no invasion of the suspect's privacy beyond that already authorized by the officer's search for weapons; if the object is contraband, its warrantless seizure would be justified by the same practical considerations that inhere in the plain view context.

Dickerson at 2137, 124 L. Ed. 2d at 346. Applying this "plain feel" exception to the facts before it, the Supreme Court held that the officer's search was not authorized by *Terry* because the incriminating character of the lump in defendant's pocket was not immediately apparent because the officer had to slide it through his fingers and otherwise manipulate the lump to determine its incriminating character.

In the present matter Officer Faulkenberry testified that while performing his pat down search he felt a package or a lump in defendant's pocket and that he could tell there were smaller pieces within the lump. At first blush, the present matter appears indistinguishable from *Dickerson*. However, upon closer examination there are several critical differences between the case at bar and *Dickerson*. In both *Dickerson* and the case at bar, the officer testified that he felt a lump and opined that it was cocaine. However, in

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Dickerson there was additional testimony that the officer manipulated the contents of the defendant's pocket to form his opinion that the substance was cocaine, thus refuting any notion that the character of the contraband was immediately apparent to the officer. In the case at bar there is no such additional testimony that Officer Faulkenberry manipulated the contents of defendant's pocket or that he performed a search that was not permitted under *Terry*. The extent of Officer Faulkenberry's testimony was:

As I was conducting the pat-down, I . . . started down the front and in his left breast pocket I felt a package or felt a lump. I could tell that there were small individual pieces inside of that lump and based on my past experience, I believed it to be a Controlled Substance, more than likely Crack.

Though Officer Faulkenberry's testimony sufficiently distinguishes this case from *Dickerson*, it still does not answer the ultimate question of whether the incriminating character of the lump in defendant's pocket was "immediately apparent." The resolution of this question is made difficult because the Supreme Court failed, for whatever reason, to provide a definition or a test for the phrase "immediately apparent." In fact, it has been suggested by one court that the "immediately apparent" test confuses "knowledge" and "suspicion" because an officer cannot truly verify the illegal character of a contraband substance without looking at it, and perhaps even testing it. See *United States v. Ross*, 827 F. Supp. 711 (S.D. Ala. 1993).

Since *Dickerson* was decided in June of this year, there have been several cases construing it. In *Ross*, the Southern District Court of Alabama held that the incriminating character of a matchbox found in the defendant's crotch during a lawful pat down was not immediately apparent because a matchbox is not contraband and it was irrelevant that the officer thought it contained cocaine. *Id.*; see also *State v. Parker*, 622 So. 2d 791 (La. App. 4th Cir. 1993) (removal of matchbox containing contraband not allowed because identity of contraband not readily apparent). Similarly, in *United States v. Winter*, 826 F. Supp. 33 (D. Mass. 1993), the Massachusetts District Court held that the "plain feel" rationale of *Dickerson* did not apply where the arresting officer repeatedly testified that he did not know the incriminating character of the contraband until he removed it. In contrast, the Wisconsin Court of Appeals upheld a trial court's denial of a motion to suppress

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in light of *Dickerson* when the arresting officer testified that he immediately recognized the incriminating character of a plastic bag found in defendant's waistband during a pat down search. *State v. Buchanan*, 504 N.W.2d 400 (Wis. Ct. App. 1993). The court reasoned that "given what the officer knew about the storage of cocaine, his conclusions about the character of the plastic baggie [were] reasonable." *Id.* at 404. These cases clearly establish that the item seized must be contraband itself and that the officer must be aware of the incriminating character of the contraband before seizing such.

Although we feel that the facts of the present case most clearly resemble those in *Buchanan*, the above cases offer little more than case by case guidance and fall short of definitively answering the ultimate question of what is "immediately apparent." In resolving this question we are guided by search and seizure cases decided under the "plain view" exception to the Fourth Amendment, because the "immediately apparent" requirement is common to both the "plain view" exception and the "plain feel" exception. See *Minnesota v. Dickerson*, 113 S.Ct. 2130, 124 L. Ed. 2d 334 (1993) (requiring illegal character of contraband to be immediately apparent); *State v. Church*, 110 N.C. App. 569, 430 S.E.2d 462 (1993) (criminal character of object in plain view must be immediately apparent to justify its seizure). In *State v. White*, 322 N.C. 770, 370 S.E.2d 390, cert. denied, 488 U.S. 958, 102 L. Ed. 387 (1988), our Supreme Court held that in the context of the "plain view" exception the term "immediately apparent" is "satisfied if the police have probable cause to believe that what they have come upon is evidence of criminal conduct." *Id.* at 777, 370 S.E.2d at 395. Given this statement we need only determine whether Officer Faulkenberry had probable cause to believe that the contraband he felt during his pat down search was cocaine. See e.g. *State v. Brown*, 460 U.S. 730, 75 L. Ed. 2d 502 (1983) (plurality opinion) (during routine traffic stop, incriminating character of balloon was immediately apparent because officer had probable cause to believe that balloon contained narcotics). "Probable cause is a 'common sense, practical question' based on 'the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.'" *State v. Wallace*, 111 N.C. App. 581, 584, 433 S.E.2d 238, 240 (1993) (citation omitted). "The standard to be met when considering whether probable cause exists is the totality of the circumstances." *Id.* Based upon the fact that Officer Faulkenberry was called to the scene

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to investigate alleged drug dealings and because he had made prior drug arrests in his seven years of service, we find that upon using his tactile senses, he had probable cause to believe that the contraband in defendant's pocket was cocaine. We hold that Officer Faulkenberry's search was no more intrusive than necessary because the incriminating character of the contraband substance was "immediately apparent" to him. We also distinguish this case from *Dickerson* because Officer Faulkenberry was in the midst of a weapon's search when he felt the contraband, whereas in *Dickerson* the officer had already convinced himself that defendant's pocket did not contain a weapon. We find that the facts of this case are distinguishable from those in *Dickerson* and affirm the trial court's denial of defendant's motion to suppress.

Affirmed.

Judges WELLS and MARTIN concur.

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AND TRIDEVESCO, INC., DEFENDANTS AND THIRD-PARTY PLAINTIFFS v. JULES
W. SMYTHE, JR., AND VINTAGE PROPERTIES, INC., THIRD-PARTY
DEFENDANTS

HOUSE HEALERS RESTORATIONS, INC., PLAINTIFF v. TRIDEVESCO, INC.,
DEFENDANT AND THIRD-PARTY PLAINTIFF v. JULES W. SMYTHE, JR., AND
VINTAGE PROPERTIES, INC., THIRD-PARTY DEFENDANTS

HOUSE HEALERS RESTORATIONS, INC., PLAINTIFF v. DALLAS A. SMITH,
JR., PHILIP C. DEATON, AND TRIDEVESCO, INC., DEFENDANTS AND THIRD-
PARTY PLAINTIFFS v. JULES W. SMYTHE, JR., AND VINTAGE PROPER-
TIES, INC., THIRD-PARTY DEFENDANTS

No. 9121SC1232

(Filed 7 December 1993)

**1. Appeal and Error § 99 (NCI4th); Pleadings § 303 (NCI4th)—
amendment of pleadings denied—compulsory counterclaims—
denial of amendment immediately appealable**

Counterclaims were compulsory, and the denial of a motion to amend an answer to add those counterclaims and addi-

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tional parties was immediately appealable, where defendant conceded that the claims arose from the same series of transactions as the original complaints.

Am Jur 2d, Appeal and Error § 99; Counterclaim, Recoupment, and Setoff § 4.

2. Pleadings § 364 (NCI4th)— motion to amend pleadings to add compulsory counterclaims—denied—no abuse of discretion

The trial court did not abuse its discretion by denying a motion to amend an answer to add compulsory counterclaims and additional parties where, although the trial judge made no findings to support the denial of its motion, Vintage, the third-party defendant seeking to add counterclaims, proffered counterclaims one year and three months after the filing of the complaint and after extensive discovery had taken place, the counterclaims would require evidence of transactions which occurred three to five years earlier, and Vintage sought to allege unfair and deceptive business practices for the first time. The non-movants should not be penalized with more discovery and litigation because Vintage and House Healers were initially acting *pro se* and their first attorney was dilatory.

Am Jur 2d, Pleading § 310.

Judge GREENE concurring.

Appeal by third-party defendant Vintage Properties, Inc. from order entered 27 August 1991 by Judge Thomas W. Seay, Jr. in Forsyth County Superior Court. Heard in the Court of Appeals 1 December 1992.

Blanton & Blanton, by Ted Blanton, for third-party defendant-appellant Vintage Properties, Inc.

Hatfield, Mountcastle, Deal & Van Zandt, by Jeffrey I. Hrdlicka and John P. Van Zandt, III, for defendants and third-party plaintiffs.

LEWIS, Judge.

Plaintiff House Healers Restorations, Inc. (hereafter "House Healers"), a North Carolina corporation engaged in the repair and restoration of residential and commercial properties, initiated three actions on 19 March 1990 to perfect and enforce liens filed against

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defendants for construction and renovation work performed by plaintiff on defendants' real properties. Defendants, Tridevesco, Inc. (hereafter "Tridevesco") and its shareholders, denied plaintiff's allegations and filed counterclaims in the three actions alleging that plaintiff had been paid and no further payment was owed. They also filed third-party complaints against Vintage Properties, Inc. (hereafter "Vintage") and Jules W. Smythe, Jr., president of both House Healers and Vintage. House Healers and Vintage, acting *pro se*, denied the allegations of the counterclaims and third-party complaints. On 25 July 1991, having acquired counsel in October 1990 and present counsel in June 1991, Vintage filed a motion to add counterclaims and additional parties. The trial court denied this motion on 27 August 1991, and Vintage now appeals to this Court.

[1] This Court has held that the denial of a motion to amend an answer to add a compulsory counterclaim is immediately appealable because it affects a substantial right. *Hudspeth v. Bunzey*, 35 N.C. App. 231, 234, 241 S.E.2d 119, 121, *disc. review denied and appeal dismissed*, 294 N.C. 736, 244 S.E.2d 154 (1978). Failure to assert a compulsory counterclaim ordinarily bars future action on the claim. *Id.* This result would obviously affect a substantial right of the movant. According to Rule 13(a) of the N.C. Rules of Civil Procedure, a counterclaim is compulsory if it "arises out of the transaction or occurrence that is the subject matter of the opposing party's claim. . . ." N.C.G.S. § 1A-1, Rule 13(a) (1990).

The counterclaims involved in this appeal were compulsory. They arose out of business dealings of the parties covering over a two-year period and the expenditure of over one million dollars. Defendants concede that the counterclaims are compulsory in their brief by stating that they "arise out of the same series of transactions as the claims in the original Complaints." Moreover, defendants claim that "a reasonable person would have brought all of the claims on the original complaints."

[2] Because a substantial right is involved, we now address the merits of this appeal. If a counterclaim is omitted through "oversight, inadvertence, or excusable neglect," or if "justice requires," leave of Court *may* be granted to add the counterclaim through amendment. § 1A-1, Rule 13(f). Leave to amend should be granted when "justice so requires," or by written consent of the adverse party. § 1A-1, Rule 15(a) (1990). The granting or denial of a motion

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to amend is within the sound discretion of the trial judge, whose decision is reviewed under an abuse of discretion standard. *News & Observer Publishing Co. v. Poole*, 330 N.C. 465, 485, 412 S.E.2d 7, 19 (1992); *Patrick v. Ronald Williams Professional Ass'n*, 102 N.C. App. 355, 360, 402 S.E.2d 452, 455 (1991). Whether or not a counterclaim is compulsory does not affect the discretion of the trial judge in granting or denying the motion to amend. *Grant & Hastings, P.A. v. Arlin*, 77 N.C. App. 813, 815, 336 S.E.2d 111, 112 (1985), *disc. review denied*, 316 N.C. 376, 342 S.E.2d 894 (1986).

Vintage points out that the trial judge made no findings to support the denial of its motion. However, Rule 52 states that "[f]indings of fact and conclusions of law are necessary on decisions of any motion or order ex mero motu only when requested by a party and as provided by Rule 41(b)." § 1A-1, Rule 52(a)(2) (1990). There was no such request in this case. Thus, it is presumed that the judge made the determination based upon proper evidence. *Patrick*, 102 N.C. App. at 360, 402 S.E.2d at 455 (citation omitted). An appellate court may examine the apparent reasons for a denial of a motion to amend if no reasons are given. *United Leasing Corp. v. Miller*, 60 N.C. App. 40, 42-43, 298 S.E.2d 409, 411 (1982), *disc. review denied*, 308 N.C. 194, 302 S.E.2d 248 (1983). Factors to be considered by the trial judge include undue delay, bad faith, and undue prejudice. *Patrick*, 102 N.C. App. at 360, 402 S.E.2d at 455 (citation omitted).

Vintage contends that because it was acting *pro se* for a time, it should not be strictly held to the standards set forth in the N.C. Rules of Civil Procedure. It further points out that its first counsel failed to bring the motion although it urged him to do so. Thus, Vintage claims the delay was due to excusable neglect and the motion should have been allowed.

Vintage's proposed counterclaims allege breach of various contracts, assert that money is owed to it by Tridevesco, and for the first time assert unfair and deceptive business practices by Tridevesco. In *Kinnard v. Mecklenburg Fair, Ltd.*, 46 N.C. App. 725, 266 S.E.2d 14, *aff'd*, 301 N.C. 522, 271 S.E.2d 909 (1980), the Court found no abuse of discretion where the trial court denied the motion to amend to assert unfair and deceptive business practices for the first time. The Court reasoned that the new allegations would "greatly change the nature of the defense" and would subject the defendant to treble damages thereby "greatly increas[ing] the

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stakes of the lawsuit.” 46 N.C. App. at 727, 266 S.E.2d at 16. The Court also noted that further discovery and delay would result. *Id.* In *Patrick v. Ronald Williams Professional Ass’n*, 102 N.C. App. 355, 402 S.E.2d 452 (1991), the trial court properly denied a motion to amend where a full year had elapsed since movants had filed their answer, both parties had conducted extensive discovery, and the proposed claims would have required evidence of negligence approximately five years after the accident in question. 102 N.C. App. at 360, 402 S.E.2d at 455.

Vintage proffered its counterclaims one year and three months after the filing of the complaint. By this time extensive discovery had already taken place. Moreover, the new counterclaims would require evidence of transactions which occurred three to five years earlier. As in *Kinnard*, Vintage seeks to allege unfair and deceptive business practices for the first time. Defendants should not be penalized with more discovery and litigation and for the first time be exposed to treble damages because Vintage was initially acting *pro se* and its first attorney was dilatory. We conclude that there was no abuse of discretion in this case.

The trial court knew Vintage had acted *pro se* for several months. We believe that the trial court gave due consideration to this and other appropriate factors in reaching its decision. The decision of the trial court denying the motion to amend is hereby

Affirmed.

Judge COZORT concurs.

Judge GREENE concurs with separate opinion.

Judge GREENE concurs with separate opinion.

I agree with the majority that the grant or denial of a motion to amend pleadings is within the discretion of the trial court. I write separately to emphasize that it is an abuse of discretion to deny leave to amend “without any justifying reason appearing for the denial.” *Gladstein v. South Square Assoc.*, 39 N.C. App. 171, 178, 249 S.E.2d 827, 831 (1978), *disc. rev. denied*, 296 N.C. 736, 254 S.E.2d 178 (1979); *Coffey v. Coffey*, 94 N.C. App. 717, 722, 381 S.E.2d 467, 471 (1989), *disc. rev. improvidently allowed*, 326 N.C. 586, 391 S.E.2d 40 (1990); *Coble Cranes & Equip. Co.*

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v. B & W Utilities, Inc., 111 N.C. App. 910, 913, 433 S.E.2d 464, 465 (1993). A "justifying reason" must be either declared by the trial court or apparent from the record. *Banner v. Banner*, 86 N.C. App. 397, 400, 358 S.E.2d 110, 111 (1987), *overruled on other grounds by Stachlowski v. Stach*, 328 N.C. 276, 401 S.E.2d 638 (1991). In this case, there is no declared reason for denying the motion to amend the answer. Thus, the question is whether there are any justifying reasons apparent from the record. "Justifying reasons" approved by our courts include "undue delay, bad faith, dilatory motive, repeated failure to cure deficiencies, undue prejudice and futility of the amendment." *Coffey*, 94 N.C. App. at 722, 381 S.E.2d at 471.

In this case, the record reveals, as noted by the majority, that to allow the amendments would unduly prejudice the non-movants. The proffered amendment was offered more than one year after the filing of the complaint and at a time after extensive discovery had already occurred. Accordingly, I join with the majority in affirming the decision of the trial court to deny third-party defendant Vintage Properties, Inc.'s motion to amend its pleadings.

ELIZABETH WAGNER HARVEY, PLAINTIFF-APPELLANT v. RICKY ODELL
HARVEY, DEFENDANT-APPELLEE

No. 9222DC1004

(Filed 7 December 1993)

1. Divorce and Separation § 140 (NCI4th)— equitable distribution—partnership interest—method of valuation—after-tax basis improper

In an equitable distribution action, the trial court did not err in valuing defendant's interest in an accounting partnership by using the method provided in the partnership agreement for valuing the interest of a withdrawing partner, and the trial court's findings with respect to value were supported by sufficient evidence; however, the trial court erred by valuing defendant's partnership interest on an after-tax basis, since evidence of circumstances not in existence on the date of separa-

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tion is not competent evidence for the purpose of valuing a marital asset.

Am Jur 2d, Divorce and Separation § 942.**2. Divorce and Separation § 167 (NCI4th)— equitable distribution—tax sheltered assets—distribution in accord with pretrial stipulations proper**

The trial court in an equitable distribution action did not err in the distribution of the parties' tax sheltered marital assets, since the distribution was in accord with the parties' pretrial stipulations.

Am Jur 2d, Divorce and Separation §§ 870 et seq.**3. Divorce and Separation § 167 (NCI4th)— equitable distribution—QDRO—inclusion of partnership interest—no error**

Defendant's partnership interest in an accounting partnership was subject to distribution under a QDRO, even though it was not a pension or retirement fund, since nothing in 29 U.S.C. 1056 prohibits inclusion of non-deferred compensation benefits in an order which also distributes pension or retirement benefits.

Am Jur 2d, Divorce and Separation §§ 905 et seq.

Pension or retirement benefits as subject to award or division by court in settlement of property rights between spouses. 94 ALR3d 176.

4. Divorce and Separation § 167 (NCI4th)— retirement benefits—post-separation gains—no inclusion in award

The trial court did not err in failing to account for and distribute gains which accrued on the parties' retirement benefits after the date of separation. N.C.G.S. § 50-20(b)(3).

Am Jur 2d, Divorce and Separation §§ 905 et seq.

Pension or retirement benefits as subject to award or division by court in settlement of property rights between spouses. 94 ALR3d 176.

On writ of certiorari to review orders entered 23 March 1992 by Judge Robert W. Johnson in Davidson County District Court. Heard in the Court of Appeals 16 September 1993.

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Plaintiff and defendant were married on 16 November 1974. Two children were born of the marriage prior to the couple's separation on 28 June 1987. A judgment of absolute divorce was entered 8 September 1988. This equitable distribution action was commenced 5 July 1988.

By pretrial order, approved and signed by the trial court, the parties stipulated that an equal division of the marital property was an equitable division. The pretrial order also contained stipulations as to how the majority of the marital property was to be distributed between the parties. The court entered an Equitable Distribution Order in accordance with the parties pretrial stipulation, distributing net assets totaling \$230,322.16. The net value of the assets distributed to plaintiff totaled \$150,795.51. The net value of the assets distributed to defendant totaled \$79,526.65. To equalize the difference between the distribution to plaintiff and the distribution to defendant, the order provided that plaintiff was to pay defendant a distributive award of \$57,013.93. The valuation and distribution of these items are not disputed on appeal.

The remainder of the couple's assets were distributed pursuant to the court's Qualified Domestic Relations Order (QDRO). The evidence at trial regarding these assets tended to show that plaintiff was the owner of an annuity savings account and an individual retirement account. By stipulation, these assets were to be distributed to plaintiff. Defendant owned a 12.5% partnership interest in the accounting firm of Turlington & Company, a Keogh retirement plan, and an individual retirement account. By stipulation, these assets were to be distributed to defendant. The court found that the assets distributed to plaintiff under the QDRO had a net value of \$9,252.30, and that the assets distributed to defendant had a net value of \$52,011.30. Therefore the order provided that defendant was to pay plaintiff \$21,379.50 to equalize the distribution of assets under the QDRO. Plaintiff appealed.

J. Sam Johnson, Jr., for plaintiff-appellant.

Wilson, Biesecker, Tripp and Sink, by Joe E. Biesecker, and Max R. Rodden for defendant-appellee.

MARTIN, Judge.

Plaintiff's assignments of error relate only to the valuation and distribution of the marital assets which were the subject of

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the court's Qualified Domestic Relations Order. We overrule all of her arguments except one, and remand for error in the trial court's valuation of defendant's partnership interest.

[1] Plaintiff's appeal of the trial court's valuation of defendant's partnership interest presents us with the issue of whether the valuation method utilized by the trial court reasonably approximates the net value of the partnership interest. *Weaver v. Weaver*, 72 N.C. App. 409, 324 S.E.2d 915 (1985). Partnership agreements which include provisions for calculating the partnership interest of a withdrawing partner may provide a useful method of calculating a partnership interest unless the calculation penalizes or awards withdrawal. *Id.* When the terms of the partnership agreement are used to value the partnership interest, the value of the interest calculated is only a presumptive value and may be attacked by either party. *Id.* When valuing a professional practice, a court should consider the business' fixed assets, the value of its work in progress and accounts receivable, its goodwill and its liabilities. *Poore v. Poore*, 75 N.C. App. 414, 331 S.E.2d 266, *disc. review denied*, 314 N.C. 543, 335 S.E.2d 316 (1985).

First, plaintiff argues that the valuation method adopted by the court was erroneous. The record shows that the court valued defendant's partnership interest using the method provided in the partnership agreement for valuing the interest of a withdrawing partner. In *Weaver, supra*, we held that partnership agreements may provide a useful method for valuing a party's partnership interest. Although there was evidence that defendant's agreement included disincentives for withdrawal, the disincentives were not included in the provisions governing the valuation of a withdrawing partner's partnership interest. In addition, the agreement considered all components of a professional practice which we identified in *Poore*, 75 N.C. App. 414, 331 S.E.2d 266, as proper factors for consideration in valuing a partnership interest. Based on our decisions in *Weaver* and *Poore*, we find no error in the valuation method utilized by the court.

Next, plaintiff argues that the court's findings of fact were contrary to the greater weight of the evidence. We disagree. Where the trial judge sits as trier of fact, the judge's findings of fact are conclusive on appeal if supported by competent evidence. *Pake v. Byrd*, 55 N.C. App. 551, 286 S.E.2d 588 (1982).

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Defendant presented the expert testimony of Certified Public Accountant Edna Shore as evidence of the value of his partnership interest. Ms. Shore testified that, in her opinion, the method provided by the partnership agreement for calculating a withdrawing partner's interest took into consideration the practice's fixed assets, liabilities, good will, work in progress and accounts receivable, and was the most accurate method to determine the value of defendant's partnership interest. Using this method, Ms. Shore calculated the gross value of defendant's interest on the date of separation as \$39,537.00. Pursuant to the partnership agreement, this amount would be payable to defendant over a period of ten years. Therefore, Ms. Shore discounted the gross value by 8.25%, the prime rate of interest on the date of separation. The discounted value of defendant's interest was \$26,863.00. To this amount, Ms. Shore added the value of defendant's capital account and arrived at a before tax value of \$29,173.00. Ms. Shore then deducted income taxes which would be owed on that amount if defendant withdrew from the partnership and concluded that the net present value of defendant's interest was \$18,549.00. Although plaintiff presented evidence that the value of defendant's partnership interest was greater than the value found by the court, the court's finding was supported by the competent testimony of defendant's expert witness. Thus, the court's findings were supported by sufficient evidence.

Plaintiff also argues that the court erred by valuing defendant's partnership interest on an after-tax basis. This argument has merit.

In *Weaver*, we held that "[t]he trial court is not required to consider possible taxes when determining the value of property in the absence of proof that a taxable event has occurred during the marriage or will occur with the division of the marital property." *Weaver*, 72 N.C. App. at 416, 324 S.E.2d at 920. In *Wilkins v. Wilkins*, 111 N.C. App. 541, 432 S.E.2d 891 (1993), we held that it was improper to value the plaintiff's retirement benefits on an after tax basis. We reasoned that calculating the value of the assets based on "hypothetical tax consequences arising from speculative early withdrawals" violated the provision of G.S. § 50-20(b)(1) that vested retirement or pension funds are to be valued as of the date of separation. *Wilkins*, 111 N.C. App. at 549, 432 S.E.2d at 895. These cases stand for the principle that evidence of circumstances not in existence on the date of separation is not competent evidence for the purpose of valuing a marital asset. *Christenson v. Christenson*,

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101 N.C. App. 47, 398 S.E.2d 634 (1990). Similarly, in *Weaver and Wilkins* we held that it is improper to consider possible tax consequences as a distributive factor under G.S. § 50-20(c)(11) in the absence of evidence that some taxable event has already occurred or that the distribution ordered by the court will itself create some immediate tax consequence to either of the parties. See, *Smith v. Smith*, 104 N.C. App. 788, 411 S.E.2d 197 (1991).

In the present case, there was no evidence that defendant had actually withdrawn his partnership interest, or that the distribution ordered by the court would require him to do so. Nevertheless, the court deducted from the value of defendant's partnership interest the amount of income tax defendant would have owed had he withdrawn his partnership interest. Under *Weaver and Wilkins* it was improper for the court to consider such hypothetical and speculative tax consequences in valuing defendant's partnership interest.

[2] Plaintiff also assigns error to the court's distribution of the marital assets which were included in the Qualified Domestic Relations Order. She argues first that the distribution was erroneous because defendant received more than fifty percent of the couple's "tax sheltered" marital assets. Finally, she argues that the QDRO was erroneous because it included assets not subject to inclusion in a QDRO and because the order did not distribute gains which accrued after the date of separation. We find no merit to either of these contentions.

We find no error in the distribution of the parties' "tax sheltered" marital assets because the distribution was in accord with the parties' pretrial stipulations. As stipulated, defendant received his Keogh retirement plan, his partnership interest in Turlington & Co., and his individual IRA; plaintiff received her individual IRA and her annuity savings account. To comply with the parties' further stipulation that the marital assets were to be distributed equally, the order provided that plaintiff was entitled to receive from defendant a distributive award in cash or by way of assignment. Our holding that the court erred in valuing defendant's partnership interest simply requires that the court must recalculate the amount of the distributive award required to equalize the shares of the parties, after properly valuing defendant's partnership interest.

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[3] Plaintiff also argues that the distribution provided by the QDRO was erroneous because it included assets not subject to inclusion in a QDRO. Plaintiff argues that defendant's partnership interest is not subject to distribution under a QDRO because it is not a pension or retirement fund. We disagree.

A "qualified domestic relations order" is nothing more than the title given to an order which meets the requirements of 29 U.S.C. 1056(d)(3)(A). Nothing in 29 U.S.C. 1056 prohibits inclusion of non-deferred compensation benefits in an order which also distributes pension or retirement benefits. While we agree with plaintiff that defendant's partnership interest is not the equivalent of a pension or retirement fund, we cannot determine how this asset's inclusion in the order deprived her of an equal share of the parties' marital property. Plaintiff stipulated that an equal division of the marital property was an equitable division and pursuant to the court's order that is what she received. This argument is without merit.

[4] Plaintiff also contends that the trial court erred by failing to account for and distribute gains which accrued on the parties' retirement benefits after the date of separation. We disagree. G.S. § 50-20(b)(3) provides that distributive awards of vested retirement benefits "shall be based on the vested accrued benefit as provided by the plan or fund, *calculated as of the date of separation* and shall not include contributions, years of service or compensation which may accrue after the date of separation [emphasis added]."

The only provision in G.S. § 50-20(b)(3) for the inclusion of gains and losses on vested benefits relates to gains and losses that accrue on benefits which are prorated for distribution at a later time. G.S. § 50-20(b)(3)c. The benefits at issue in the present case were to be distributed immediately. Therefore there was no requirement that the court account for gains or losses accruing after the date of separation. We find no error in the court's distribution of the assets included in the QDRO.

Plaintiff also argues that the court erred by improperly valuing defendant's IRA and his Keogh retirement plan. We do not address these arguments because they are not the subject of an assignment of error and are therefore outside the scope of our review. N.C.R. App. P. 10(a).

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For the reasons set forth herein, we vacate that portion of the Qualified Domestic Relations Order which determines the value of defendant's partnership interest in Turlington & Company and remand this case to the district court for a proper determination of such value and recalculation of the amount of any distributive award to which plaintiff may be entitled as a result of such valuation.

Vacated and remanded.

Judges WELLS and LEWIS concur.

IN RE: JOHN L. SULLIVAN, III, M.D.

No. 9210SC1142

(Filed 7 December 1993)

Administrative Law and Procedure § 31 (NCI4th) — Board of Medical Examiners — expungement of records — notice and hearing

Petitioner was entitled to notice and to an opportunity to be heard pursuant to N.C.G.S. § 150B-38 prior to respondent's decision in a request to expunge records, and the matter was remanded for a hearing, because a dispute involving the existence of allegedly prejudicial information in respondent's public file pertinent to petitioner's license to practice medicine affects petitioner's substantive rights and qualifies as a contested case under N.C.G.S. § 150B-2(2). Petitioner's letter requesting that the material be expunged and indicating that he would be happy to meet with the Board in an informal conference was sufficient to trigger the contested case provisions of N.C.G.S. § 150B-38.

Am Jur 2d, Administrative Law §§ 359-363, 397-404.

Appeal by petitioner from order entered 17 August 1992 by Judge W. Steven Allen in Wake County Superior Court. Heard in the Court of Appeals 6 October 1993.

Petitioner, Dr. John L. Sullivan, III, has been licensed to practice medicine in the State of North Carolina since 1977. Additionally, he is licensed to practice medicine in the State of Maryland

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and in the State of Indiana. This case involves the North Carolina Board of Medical Examiners' (hereinafter "respondent") denial of petitioner's request to expunge certain information appearing in respondent's records. The information pertains to a "Notice of Charges and Allegations" (dated 11 April 1985) which was subsequently dismissed by respondent on 24 June 1985. Petitioner has made his request for expungement of this information in writing, along with written requests to meet with respondent to present his case, on at least four separate occasions via correspondence with respondent. Respondent has not given petitioner an opportunity for a hearing. Furthermore, no transcript or minutes of respondent's proceedings appear in the record on appeal. Accordingly, we set out in pertinent part correspondence between petitioner and respondent.

On 21 June 1991, petitioner's counsel made petitioner's original request for expungement by the following letter which stated (in addition to a full disclosure of the underlying facts not reprinted here) the following:

We have been retained by John Lawrence Sullivan, M.D., to represent him in his request to the Board of Medical Examiners of the State of North Carolina to expunge that information in the Board's public records concerning Dr. Sullivan. . . .

. . . .

We respectfully request that the Board expunge the public record that it is maintaining on Dr. Sullivan. . . .

. . . .

Dr. Sullivan will be happy to meet with the Board in an informal conference. We will be happy to provide the Board with additional letters Additionally, we will be happy to present a memorandum of law to support Dr. Sullivan's request.

In conclusion, the Notice of Charges and Allegations were based on erroneous information received by the Board. Dr. Sullivan has fully cooperated and met all requirements. The information in the public file is prejudicial to Dr. Sullivan. We, on behalf of Dr. Sullivan, respectfully request that the Board, pursuant to its inherent authority, expunge its public record concerning Dr. Sullivan. If the Board is hesitant to expunge the public record concerning Dr. Sullivan, we respect-

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fully request an opportunity for Dr. Sullivan to meet with the Board in an informal conference.

On 2 July 1991, the Board sent petitioner's counsel a letter acknowledging receipt of the 21 June 1991 letter, *supra*, and stating that "[t]his matter will be presented to the Board at the next meeting in July and we will advise you of the Board's response as soon as practical after the meeting." The Board's letter did not refer to or respond to petitioner's request to meet with the Board.

On 9 July 1991, petitioner's counsel transmitted another letter to respondent which stated as follows:

. . . Pursuant to our previous correspondence, we respectfully request the Board of Medical Examiners to expunge the unfavorable information that is in its public file regarding Dr. Sullivan.

The information in the Board of Medical Examiners' public file regarding Dr. Sullivan is prejudicial to him. We are of the opinion that the Board has the authority and responsibility to expunge prejudicial records generated on the basis that Dr. Sullivan's records were [sic]. We, therefore, respectfully urge the Board to expunge the unfavorable information in Dr. Sullivan's public record.

If the Board has any hesitancy in expunging the prejudicial information in Dr. Sullivan's file, I respectfully request an opportunity to meet with the Board to present Dr. Sullivan's interests and at the same time hand up a memorandum of law stating our opinion and that we support Dr. Sullivan's request that the prejudicial information in his public record be expunged.

Dr. Sullivan will also be happy to meet with the Board at any time. As you can appreciate, this is a most serious matter for Dr. Sullivan. The prejudicial information may well imperil Dr. Sullivan's future unless it is expunged. . . .

Sometime prior to 12 August 1991, respondent denied petitioner's request to expunge petitioner's file. On 12 August 1991, counsel for petitioner requested a reconsideration of respondent's denial and forwarded *inter alia* a memorandum of law in support of petitioner's request to expunge the allegedly prejudicial information from his public file. In this letter, petitioner's counsel stated

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"I respectfully request an opportunity to meet with counsel to the Board of Medical Examiners of the State of North Carolina in the event that counsel is not inclined to recommend that Dr. Sullivan's record be expunged as requested." On 12 November 1991, petitioner received the following letter from respondent-board:

At its September meeting the Board of Medical Examiners reconsidered your request to have Dr. Sullivan's records expunged.

As a result of its consideration, the Board again denied your request.

Once again, the Board's letter did not refer to or respond to petitioner's request to meet with the Board. On 18 October 1991, petitioner's counsel sent another letter to respondent which stated:

I respectfully request an opportunity to meet with the Board during its November meeting to request the Board to reconsider its decision, and I am enclosing a copy of our Memorandum that I shall appreciate you distributing to the Board for review prior to the time that I meet with it.

I sincerely hope that the Board will permit me to appear in behalf of Dr. Sullivan at its November meeting. Dr. Sullivan, of course, will be happy to appear if the Board feels it would be helpful for him to appear before the Board also.

On 9 December 1991, petitioner received the following letter from respondent-board:

At its recent meeting, the Board of Medical Examiners of the State of North Carolina reviewed your request to have unfavorable information expunged from Dr. Sullivan's public file.

As a result of this review, the Board denies your request. If you have any questions regarding this matter, please advise.

On 7 January 1992, petitioner filed a "Notice of Appeal to the Superior Court of Wake County" seeking judicial review of respondent's decision pursuant to G.S. 150B-45. On 17 August 1992, the trial court entered an order in favor of respondent which concluded that "the Board [respondent] is without statutory authority to expunge its records regarding petitioner and that the decision of the Board should be affirmed in that petitioner is not otherwise entitled to relief." Petitioner appeals.

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Hollowell, Eldridge & Ingersoll, P.A., by Edward E. Hollowell, James E. Eldridge, and Joan M. Mitchell, for petitioner-appellant.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, by Michael E. Weddington, for respondent-appellee.

EAGLES, Judge.

Petitioner brings forward five assignments of error. Assignment of error No. 6 is not brought forward and is deemed abandoned. N.C.R. App. P. 28(b)(5). After a careful consideration, we reverse and remand.

Respondent is an occupational licensing agency and accordingly must comply with the provisions of Article 3A of Chapter 150B of the General Statutes. G.S. 150B-38(a). Article 3A, G.S. 150B-38 provides *inter alia*:

(b) Prior to any agency action in a contested case, the agency shall give the parties in the case an opportunity for a hearing without undue delay and notice not less than 15 days before the hearing. Notice to the parties shall include:

(1) A statement of the date, hour, place, and nature of the hearing;

(2) A reference to the particular sections of the statutes and rules involved; and

(3) A short and plain statement of the facts alleged.

(c) Notice shall be given personally or by certified mail. If given by certified mail, notice shall be deemed to have been given on the delivery date appearing on the return receipt. If notice cannot be given personally or by certified mail, then notice shall be given in the manner provided in G.S. 1A-1, Rule 4(j1).

(d) A party who has been served with a notice of hearing may file a written response with the agency. If a written response is filed, a copy of the response must be mailed to all other parties not less than 10 days before the date set for the hearing.

(e) All hearings conducted under this Article shall be open to the public. A hearing conducted by the agency shall be

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held in the county where the agency maintains its principal office. A hearing conducted for the agency by an administrative law judge requested under G.S. 150B-40 shall be held in a county in this State where any person whose property or rights are the subject matter of the hearing resides. If a different venue would promote the ends of justice or better serve the convenience of witnesses, the agency or the administrative law judge may designate another county. A person whose property or rights are the subject matter of the hearing waives his objection to venue if he proceeds in the hearing.

G.S. 150B-38(b) specifically provides that the agency shall give a party an opportunity for hearing and notice "[p]rior to any agency action in a contested case." G.S. 150B-2(2) defines a "contested case" as "an administrative proceeding pursuant to this Chapter to resolve a dispute between an agency and another person that involves the person's rights, duties, or privileges, including licensing or the levy of a monetary penalty." A dispute involving the existence of allegedly prejudicial information in respondent's public file pertinent to petitioner's license affects petitioner's substantive rights and qualifies as a contested case under G.S. 150B-2(2). Nonetheless, respondent contends that "Dr. Sullivan failed to initiate a contested case under the Administrative Procedure Act. . . . Statutory requirements governing contested cases require that a contested case be commenced 'by filing a petition with the Office of Administrative Hearings.' N.C. Gen. Stat. § 150B-23." However, these provisions apply only to Article 3; under Article 3A, there is no requirement that a petition or other notice be filed with the Office of Administrative Hearings. *Compare* G.S. 150B-23(a) *with* G.S. 150B-38. Accordingly, we hold that petitioner's 21 June 1991 letter was sufficient to trigger the contested case provisions of G.S. 150B-38, *supra*, and that respondent's subsequent action constituted agency action on a contested case which affected the substantive rights of petitioner.

The General Assembly has provided that it is the Board's duty to maintain records regarding licensees. G.S. 90-16. We note that while respondent correctly notes that there is no express statutory authority setting forth guidelines for the expungement of information from the files of the Board of Medical Examiners, the statutory duty to maintain records concerning licensees, G.S. 90-16, carries with it the concomitant responsibility to assure that there is a factual basis for any record maintained and to assure

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that records maintained in obedience to the statute are accurate. This requirement is both reasonable and critically important when the records bear on one's license to engage in an occupational livelihood. *See generally In Re Magee*, 87 N.C. App. 650, 362 S.E.2d 564 (1987).

In sum, we hold that petitioner was entitled to notice and to an opportunity to be heard pursuant to G.S. 150B-38 prior to respondent's decision in this action. Accordingly, we reverse the trial court's order with instructions that the cause be remanded to respondent for a hearing. We need not address petitioner's remaining assignments of error.

Reversed and remanded.

Judges ORR and GREENE concur.

NATIONWIDE MUTUAL INSURANCE COMPANY, PLAINTIFF v. CHOICE FLOOR COVERING COMPANY, AETNA CASUALTY AND SURETY COMPANY, DAVID COLEMAN COLVIN AND FANNIE FALLS COLVIN, DEFENDANTS

No. 9210SC1035

(Filed 7 December 1993)

Insurance § 621 (NCI4th)— automobile insurance—renewal payment with bad check—no duty to defend

The trial court did not err in a declaratory judgment action to determine whether an insurance policy was still in effect by granting summary judgment for plaintiff-insurer where a check from defendant-insured for a renewal premium which had been hand delivered on the expiration date was twice refused by the bank for insufficient funds, both refusals occurred after the policy expiration date, and defendant was in an accident after the expiration date. Plaintiff was under no obligation to provide coverage to defendant on the basis of the tender of the check to the agent, nor was it under an obligation to continue to provide coverage while it maintained an action against the insured for collection of the check. Although *Pearson v. Nationwide Insurance*, 325 N.C. 246, held

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that an insurer must strictly comply with the requirements of N.C.G.S. §§ 20-310 *et seq.* to cancel an automobile insurance policy, that case involved a mid-term cancellation; here the policy lapsed and expired on its own terms due to defendant's failure to properly respond to the renewal notices.

Am Jur 2d, Insurance §§ 380 et seq.

Appeal by defendants from order entered 10 June 1992 in Wake County Superior Court by Judge Donald W. Stephens. Heard in the Court of Appeals 29 September 1993.

A declaratory judgment action was filed by the Plaintiff Nationwide Mutual Insurance Company (Nationwide) seeking a determination of whether the insurance policy that was issued to the defendant David Colvin was still in force and effect at the time of an automobile accident involving Colvin on 23 March 1989. The accident involved the Colvins and employees of Choice Floor Covering and is the subject of a pending lawsuit in Mecklenburg County. The employees of Choice Floor Covering are seeking recovery for damages arising out of that accident from the Colvins. Nationwide is defending the Colvins under a reservation of rights pending the outcome of this action.

Nationwide asserted in its complaint that due to non-payment of the premium by the insured (the Colvins) at renewal time, Nationwide had no duty to defend in the above negligence action. Specifically, Nationwide argued that the check written by the insured, which was hand delivered to his agent on 13 March 1989, was refused twice by the bank for insufficient funds. Both refusals occurred after the policy expiration date of 26 February 1989. Consequently, Nationwide notified defendant Colvin on 31 March 1989 that the policy had expired on 13 March 1989.

Arguments were heard on 8 June 1992 in Wake County Superior Court. Judge Stephens granted the plaintiff's summary judgment motion, finding that the plaintiff had no legal duty to defend, provide coverage, or indemnification for any damages arising out of the 23 March accident, and that the accident "was not covered by Nationwide Insurance Company Policy No. 61H918-147." From this order, the defendants appeal.

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LeBoeuf, Lamb, Leiby & MacRae, by Charles T. Francis, for plaintiff-appellee.

Weinstein & Sturges, P.A., by James N. Freeman, Jr. and Cynthia Roberson Jarrell, for defendant-appellants Choice Floor Covering Company and Aetna Casualty and Surety Company.

Lester H. Broussard for defendant-appellants David Coleman Colvin and Fannie Falls Colvin.

ORR, Judge.

The defendants raise one issue on appeal in their assignments of error: whether the trial court erred in ruling that there was no genuine issue of material fact as to whether the defendant had insurance coverage on the date of the automobile accident and that the court therefore erred in granting summary judgment to the plaintiff. The defendants have advanced two arguments in their brief to support their contentions. First, that the notification of cancellation sent by Nationwide to the insured failed to comply with N.C. Gen. Stat. § 20-310(f)(2), and second, that where the insured attempted to pay his renewal premium within the time specified by the cancellation notice, and no opportunity was given to the insured to “cover” the dishonored check, the insured had not “failed to pay the required premium by the premium due date”, and therefore the insurer was not relieved of compliance with N.C. Gen. Stat. § 20-310(f)(2). We disagree and accordingly affirm the decision of the trial court.

The purpose of summary judgment is to provide an expeditious method of determining whether a genuine issue of material fact exists, and if not, whether the moving party is entitled to judgment as a matter of law. *Schoolfield v. Collins*, 12 N.C. App. 106, 182 S.E.2d 648 (1971), *rev'd on other grounds*, 281 N.C. 604, 189 S.E.2d 208 (1972). Where a motion for summary judgment is granted, the critical question for determination on appeal is whether, on the basis of the materials presented to the trial court, there is a genuine issue as to any material fact, and whether the movant was entitled to judgment as a matter of law. *Smith v. Smith*, 65 N.C. App. 139, 308 S.E.2d 504 (1983).

The factual history of this case arises out of an insurance policy issued to the defendant, David Coleman Colvin, in February

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1985. This policy of insurance was renewed every six months from 1985 through 1988.

On 1 February 1989, Nationwide mailed a billing to Mr. Colvin which stated that \$816.10 would be due on 26 February 1989, and that this amount would be for the policy period 26 February through 26 August 1989. On 2 March 1989, payment had not been received by Nationwide, and a notice of expiration was sent to Mr. Colvin. This notice informed him that his policy had expired on 26 February 1989. However, the notice also stated that if full payment of \$816.10 was received before 13 March 1989 the policy would be reinstated without interruption.

On 13 March, the last day of the grace period, Mr. Colvin delivered a personal check for partial payment to one of Nationwide's Gastonia agents. The check was accepted by that agent. Subsequently, the check was dishonored twice by the defendant's bank. On 31 March 1989, Nationwide sent a letter to the defendant notifying him that his check had been returned, and also sent him a "Notice Of Cancellation or Refusal To Renew", which stated that his policy had expired as of 13 March 1989.

The defendant and his wife were involved in an automobile accident on 23 March 1989 with employees from Choice Floor Coverings. Those parties incurred various injuries which were compensated for through a policy issued to Choice Floor Covering by Aetna Casualty and Surety Company. Mr. Colvin notified his Nationwide agent of the accident.

The contract of insurance at issue provided for renewal of coverage "but only if the required premium for this period had been paid and for six months renewal if the renewal premiums are paid as required." The policy further stated "[i]f we offer to renew and you or your representative do not accept, this policy will automatically terminate at the end of the current policy period. Failure to pay the required renewal or continuation premium when due shall mean that you have not accepted our offer."

Defendants rely primarily on our Supreme Court's holding in *Pearson v. Nationwide Insurance*, 325 N.C. 246, 382 S.E.2d 745 (1989). *Pearson* held that for an insurer to cancel an automobile insurance policy he must strictly comply with the requirements of N.C. Gen. Stat. § 20-310 *et seq.* However, the facts of *Pearson* are readily distinguishable from the case at bar. In *Pearson*, the

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insured was making installment payments on a policy with effective dates of 4/17/81 to 10/17/81. The insured failed to make one of those installments on 28 June 1981 *during the policy period*. The Court stated "that *midterm* cancellation by the insurer of a compulsory insurance policy for nonpayment of premium installments is not effective unless and until the insurer has strictly complied with the provisions of N.C. Gen. Stat. § 20-310(f)." *Pearson*, 325 N.C. at 250, 382 S.E.2d at 746, quoting *Pearson v. Nationwide Mutual Insurance Co.*, 90 N.C. App. 295, 301-02, 368 S.E.2d 406, 410, *disc. review denied*, 323 N.C. 175, 373 S.E.2d 112, *rec'n and disc. review allowed*, 323 N.C. 477, 373 S.E.2d 866 (1988) (emphasis added).

Unlike *Pearson*, the policy term at issue here was for six-month terms which ended as of 26 February 1989. Nationwide did not cancel the policy in such a way to invoke the provisions of N.C. Gen. Stat. § 20-310 as asserted in defendants' brief; rather, the policy lapsed and expired on its own terms due to Colvin's failure to properly respond to the renewal notices. While it is certainly true that an insurer must comply with the pertinent statutory requirements, *Nationwide Mut. Ins. Co. v. Davis*, 7 N.C. App. 152, 171 S.E.2d 601 (1970), we find that the provisions of G.S. § 20-310(g) are dispositive of the case at bar.

Subsection (g) states that "[n]othing in this section shall apply: (1) [i]f the insurer has manifested its willingness to renew by issuing or offering to issue a renewal policy, certificate, or other evidence of renewal, or has manifested such intention by any other means," As the plaintiff points out, the Supreme Court held that when interpreting an identical billing notice sent by Nationwide as was sent in the case *sub judice*, "[i]t can hardly be disputed that the premium notice taken in combination with the expiration notice and the interview with the carrier's agent comprised a sufficient manifestation of Nationwide's willingness to renew to justify invocation of the provisions of N.C.G.S. § 20-310(g)." *Smith v. Nationwide Mut. Ins. Co.*, 315 N.C. 262, 269, 337 S.E.2d 569, 573 (1985). The Court went on in *Smith* to find that the "premium notice" alone would have been sufficient to make such a showing of willingness to renew, and that the provisions of G.S. § 20-310(f) did not apply. The Court held there, and we agree, that "[t]o hold otherwise would demand that the requirements of N.C.G.S. § 20-310(f) be met in all cases where there is non-payment of a premium. Insurers, then, could never have proper termination without com-

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plying with the formal termination requirements of 20-310(f) and, as a result, subsection (g) would be superfluous." *Smith*, 315 N.C. at 272, 337 S.E.2d at 575.

In the instant case, the insured was notified on or about 2 February 1989 that the policy period was ending, and that a premium was due prior to 26 February in order to continue coverage. The letter sent on 2 March 1989 informed the insured that the policy had expired, but that he could keep uninterrupted coverage if a premium payment was made prior to 13 March 1989. However, Nationwide was under no obligation to extend coverage beyond the policy period at that point.

The record indicates that Colvin had paid absolutely nothing to Nationwide for coverage on the date of the accident. Clearly, he had no policy in force at the time, nor was Nationwide obligated to continue to notify him of the status of his premium check in order to reinstate the policy. The tender of the premium check constituted an offer by Colvin to obtain coverage from Nationwide. Prior to that date, there had been no indication that Colvin would continue coverage with Nationwide at all.

Nationwide was under no obligation to provide coverage to Colvin on the basis of the 13 March tender to the agent, nor was it under an obligation to continue to provide coverage while it maintained an action against the insured for collection of the check. "[G]iving of a worthless check is not payment." *Cauley v. American Life Ins. Co.*, 219 N.C. 398, 400, 14 S.E.2d 39, 40 (1941) (citations omitted). "Unless the payment of premium is waived, it is a condition precedent to insurance coverage." *Engelberg v. Home Ins. Co.*, 251 N.C. 166, 168, 110 S.E.2d 818, 820 (1959). As a matter of law, there was no contract, hence no coverage on the date of the accident.

For the reasons stated above, we hold that the trial court properly granted summary judgment against the defendants, and its decision is accordingly affirmed.

Affirmed.

Judges EAGLES and GREENE concur.

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[112 N.C. App. 807 (1993)]

JAMES W. PARTIN AND WIFE, SUSAN S. PARTIN; WORTH WINEBARGER AND WIFE, REBECCA WINEBARGER; BROWN OSBORNE AND WIFE, JENNIFER B. OSBORNE; AND BRUCE CHURCH AND WIFE, PEGGY S. CHURCH v. DALTON PROPERTY ASSOCIATES

No. 9317SC23

(Filed 7 December 1993)

Partition § 61 (NCI4th)— sale of land ordered—failure to make required findings—order reversed

The trial court's order requiring the sale of two tracts held by the parties as tenants in common must be reversed where the trial court failed to make the required findings of fact that actual partition would result in one of the cotenants receiving a share with a value materially less than the value of the share he would receive were the property partitioned by sale and that actual partition would materially impair a cotenant's rights. N.C.G.S. § 46-22.

Am Jur 2d, Partition §§ 194 et seq.

Appeal by respondent from order entered 23 September 1992 in Surry County Superior Court by Judge James C. Davis. Heard in the Court of Appeals 18 November 1993.

Francisco & Merritt, by H. Lee Merritt, Jr., for petitioner-appellees.

Daniel J. Park for respondent-appellant.

GREENE, Judge.

Dalton Property Associates (respondent) appeals from an order to sell two tracts of real property entered 4 October 1992 in the Superior Court of Surry County.

In August, 1988, James W. Partin and his wife, Susan S. Partin, Worth Winebarger and his wife, Rebecca Winebarger, Brown Osborne and his wife, Jennifer B. Osborne, Bruce Church and his wife, Peggy S. Church (collectively referred to as petitioners), and George W. Crater and his wife, Shannon S. Crater, purchased, as tenants in common, two tracts of real property in Surry County. The first tract consists of 400 acres bounded on the west by Haystack Road, a public road which is the only public access to the property.

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The second tract consists of 34 acres to which there is no means of access, but which adjoins other property owned by respondent. In December, 1989, respondent acquired by deed the one-fifth interest of George W. and Shannon S. Crater in the two tracts of land.

On 6 February 1992, petitioners filed a petition with the Clerk of the Surry County Superior Court asking that the property be sold. After a hearing, the Clerk made the following findings of fact and conclusion of law:

3. The subject property is unimproved. The terrain of the property is mountainous in that much of the land is steep and rocky.

4. Petitioner, BROWN OSBORNE, has conducted a magnetic boundary survey of the subject property. No other boundary survey of the subject property has been performed. According to the survey plat prepared by petitioner, BROWN OSBORNE, the boundary of the subject property is very irregular. The exact location of the boundary of the subject property is not well established.

5. The subject property has a direct means of access to it along a public road known as Haystack Road. There are no other known means of access to the subject property. There are no roads which traverse the subject property.

6. Portions of the subject property are practically inaccessible as a result of the steepness of the terrain. Other portions of the property are accessible, but only by use of a four-wheel drive vehicle.

7. The subject property consists of two tracts. The smaller of the two tracts is completely land-locked and is not contiguous with the larger tract.

8. The actual division of the subject property into five (5) equally valued shares would require a substantial expenditure of funds for surveys. The boundaries of the entire tract would need to be clearly established. The cost of a boundary survey and division of the property into equally valued parcels would be substantial.

Based upon the foregoing findings of fact, the court concludes by the preponderance of the evidence that an actual

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partition of the subject property cannot be made without substantial injury to the co-tenants.

The Clerk then entered an order that the property be sold. Respondent, pursuant to N.C. Gen. Stat. § 1-276 (1983), appealed the Clerk's order to the superior court for a trial de novo.

In the superior court, the trial judge asked respondent to present evidence "as to how this property might be divided and accessible without the necessity of a sale." Prior to hearing any evidence in this proceeding, the court further stated:

I will tell you at this time I don't—I will listen to any reason that either of you might be able to show as to why [the property] should not be sold. But I don't know how you going to ever divide this property . . . one fifth to each of the five parties and the people be able to get into it without costing them an arm and a leg; in fact, costing them far more than the value of the property just to put a road in there. Now that's where we stand. So if you folks want to present evidence as to a division of this property I will hear the division.

Respondent presented evidence that the land's best use was for recreational purposes, that Haystack Road and the existing logging road were suitable for such purposes, that the value of the land was essentially equal throughout, and that the property could be surveyed and partitioned for between \$14,000 and \$16,000. Petitioners then presented evidence that the logging road was insufficient in that it was too narrow and at points too steep to be easily passable, that the acreage nearest to Haystack Road was worth roughly \$700 per acre while the acreage at the eastern end of the property was worth \$200 or \$400 per acre depending on whether there was a means of access to the property, that there are at least six lappage concerns because property included in the tract was also claimed by adjoining landowners, and that a survey of the property would cost between \$30,000 and \$40,000. Neither party presented any evidence as to the current value of the land at the time of trial, nor as to what the value of the land would be were it to be actually partitioned.

The court adopted the findings of fact of the Clerk of the Superior Court, concluded as a matter of law that by the preponderance of the evidence an actual partition of the property

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could not be had without substantial injury to the cotenants, and ordered the sale of the property.

The issue presented is whether the trial court made sufficient findings of fact to support ordering a partition by sale.

We initially note that the record does not contain a certificate of service of the notice of appeal. Although this is grounds for dismissal of the appeal, *see Hale v. Afro-American Arts International, Inc.*, 110 N.C. App. 621, 623-24, 430 S.E.2d 457, 458-59 (1993) and N.C. R. App. P. 26(d) (1993), this Court in its discretion will treat the appeal as a petition for certiorari.

A petition for partition of land held by tenants in common is a special proceeding, and the question of whether a partition should be granted is a matter for the court, rather than a jury, to decide. *Brown v. Boger*, 263 N.C. 248, 255, 139 S.E.2d 577, 582 (1965). A tenant in common is entitled, as a matter of right, to an actual partition of the land. *Kayann Properties, Inc. v. Cox*, 268 N.C. 14, 19, 149 S.E.2d 553, 556 (1966). If an actual partition, also known as a partition in kind, cannot be made without substantial injury to any of the other tenants in common, the tenant in common seeking partition is equally entitled to a partition by sale. *See id.* at 19, 149 S.E.2d at 557; N.C.G.S. § 46-22 (Supp. 1993). Our law, however, favors actual partition over partition by sale. *Phillips v. Phillips*, 37 N.C. App. 388, 390, 246 S.E.2d 41, 43, *disc. rev. denied*, 295 N.C. 647, 248 S.E.2d 252 (1978). A tenant in common is entitled to partition by sale only if he or she can show by a preponderance of the evidence that actual partition would result in substantial injury to one of the other tenants in common. N.C.G.S. § 46-22 (Supp. 1993). A partition by sale will not be ordered merely for the convenience of one of the cotenants. *Brown*, 263 N.C. at 256, 139 S.E.2d at 583.

N.C. Gen. Stat. § 46-22, rewritten in 1985, and relevant to this matter, provides:

(a) The court shall order a sale of the property described in the petition, or of any part, only if it finds, by a preponderance of the evidence, that an actual partition of the lands cannot be made without substantial injury to any of the interested parties.

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(b) "Substantial injury" means the fair market value of each share in an in-kind partition would be materially less than the share of each cotenant in the money equivalent that would be obtained from the sale of the whole, and if an in-kind division would result in material impairment of the cotenant's rights.

(c) The court shall specifically find the facts supporting an order of sale of the property.

(d) The party seeking a sale of the property shall have the burden of proving substantial injury under the provisions of this section.

N.C.G.S. § 46-22 (Supp. 1993).

The 1985 rewrite of N.C. Gen. Stat. § 46-22 significantly changed what is required of a trial court in making the determination of whether to order an actual partition or a partition by sale of property owned by cotenants. Prior to 1985, N.C. Gen. Stat. § 46-22 read as follows: "Whenever it appears by satisfactory proof that an actual partition of the lands cannot be made without injury to some or all of the parties interested, the court shall order a sale of the property described in the petition, or any part thereof." N.C.G.S. § 46-22 (1984). Under this version of Section 46-22, a court was required to order a partition by sale if an actual partition would result in "injury," but the statute gave no guidance as to how to determine when a cotenant suffered "injury." Our courts, however, defined "injury" as "substantial injustice or material impairment of [a cotenant's] rights or position, such that it would be unconscionable to require him to submit to actual partition." *Brown*, 263 N.C. at 256, 139 S.E.2d at 583.

When the Legislature rewrote N.C. Gen. Stat. § 46-22 in 1985, it incorporated the definition of "substantial injury" stated in *Brown* and added a new requirement. Under the current version of N.C. Gen. Stat. § 46-22, before a trial court may order a partition by sale, it must first determine that an actual partition would result in substantial injury, that is, that were an actual partition ordered, one of the cotenants would receive a share with a fair market value materially less than the value of the share the cotenant would receive were the property partitioned by sale and a cotenant's rights would be materially impaired. N.C.G.S. § 46-22(b).

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In this case, the trial court concluded as a matter of law that "an actual partition of the subject property cannot be made without substantial injury to the co-tenants." To be sustained, this conclusion must be supported by a finding of fact that an actual partition would result in one of the cotenants receiving a share of the property with a value materially less than the value the cotenant would receive were the property partitioned by sale and that an actual partition would materially impair a cotenant's rights. These findings of fact must be supported by evidence of the value of the property in its unpartitioned state and evidence of what the value of each share of the property would be were an actual partition to take place.

In this case, the trial court failed to make the required findings of fact that actual partition would result in one of the cotenants receiving a share with a value materially less than the value of the share he would receive were the property partitioned by sale and that actual partition would materially impair a cotenant's rights, and there is no evidence in this record which would support such findings of fact. Therefore, the trial court's order must be reversed and the case remanded for a new trial.

Because we have granted a new trial, we do not address other issues raised by respondent. We note, however, that N.C. Gen. Stat. § 46-22(d), requires a petitioner seeking a partition by sale to bear the burden of proving by a preponderance of the evidence that an actual partition would result in substantial injury. It appears that the trial court in this case shifted the burden to respondent to prove that an actual partition would not cause petitioners substantial injury. On remand, the burden to show that an actual partition would cause substantial injury must be placed upon petitioners. We further note, that if, after a new trial, an actual partition is ordered, the trial court may order a cotenant who receives a portion of the land which has a greater value than his proportionate share of the property's total value, to pay his former cotenants money to equalize the value received by each cotenant. *See* N.C.G.S. § 46-10 (1984); *see also Moore v. Baker*, 224 N.C. 498, 502, 31 S.E.2d 526, 528 (1944) ("Equality in value must be afforded by the assessment of an owelty charge.").

Reversed and remanded for a new trial.

Judges MARTIN and JOHN concur.

KING v. N.C. ENVIRONMENTAL MGMT. COMM.

[112 N.C. App. 813 (1993)]

RUTH A. KING, PLAINTIFF-APPELLEE v. NORTH CAROLINA ENVIRONMENTAL MANAGEMENT COMMISSION, COASTAL RESOURCES COMMISSION AND DEPARTMENT OF ENVIRONMENT, HEALTH AND NATURAL RESOURCES, DEFENDANTS-APPELLANTS

No. 925SC1156

(Filed 7 December 1993)

Environmental Protection, Regulation, and Conservation § 40 (NCI4th)— development of coastal lot—denial of request for Water Quality Certification—sufficiency of evidence to support findings—trial court's substitution of own judgment for that of agencies—error

The trial court erred by substituting its own judgment for that of the agencies in question when it reversed the EMC's final agency decision denying plaintiff's request for a Federal Clean Water Act, Section 401 Water Quality Certification, since substantial evidence of record supported the EMC's finding that the elimination of a wetland would lead to violation of the water quality standards in the waters in adjacent Topsail Sound and thus constitute the removal of a significant use of the wetland in violation of the antidegradation rule, and the findings of fact struck by the superior court were supported by substantial evidence and were neither arbitrary nor capricious.

Am Jur 2d, Public Lands §§ 17, 18.

Appeal by defendants from judgment entered 29 July 1992 by Judge James D. Llewellyn in Pender County Superior Court. Heard in the Court of Appeals 18 October 1993.

Plaintiff Ruth A. King owns an undeveloped tract of land adjacent to Topsail Sound off North Carolina Highway 50 in Surf City located in Pender County. The property extends between two canals that form a peninsula projecting into marshlands. In the 1970's, the property was raised in elevation when spoil from the dredging of the adjacent canals was placed on the outside perimeter of the existing marshlands. The center two acres of the property remained lower in elevation.

Mrs. King, who is 82 years old, had granted power of attorney to her son, Walter A. Warren, for the development of this property. In July of 1988, Mr. Warren was notified by the Coastal Area

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Management Act (hereinafter CAMA) permit office for the Town of Surf City to immediately cease and desist from doing work on the property because no permit had been issued authorizing development within a designated area of environmental concern. In August of 1988, Mr. Warren received a letter from the U.S. Corps of Engineers requiring that he cease from any further work in waters or wetlands of the United States until he obtained permits. In this letter, the U.S. Corps of Engineers determined that the two-acre interior lowland was an adjacent freshwater wetland subject to the permitting requirements of Section 404 of the Federal Clean Water Act.

In March of 1989, plaintiff applied to the Division of Coastal Management (hereinafter DCM) to place fill material on the property, so that she could subdivide the land and build houses on it. Her application was placed on hold because it did not show either a storm water management plan submitted to the Division of Environmental Management (hereinafter DEM) or approval of the subdivision plan by the Town of Surf City. In July of 1989, plaintiff filed a contested case petition seeking review of the suspension of the processing of her application. On 18 July 1990, Administrative Law Judge Beecher R. Gray entered a consent order whereby plaintiff agreed to modify and clarify her permit application.

The modified application sought permission to construct a bulkhead around the outside perimeter of the property along an alignment to which DCM and the applicant had agreed in the consent order to place two feet of fill material in the two acres of interior wetlands, and to construct a marl/rock road over the proposed fill material along an alignment generally down the center of the property. The modified permit application requested that a permit be issued pursuant to CAMA and the Dredge and Fill Act, and that a water quality certification be issued by the DEM to the U.S. Corps of Engineers pursuant to Section 401 of the Federal Clean Water Act indicating the application was consistent with the State's water quality standards.

The DCM approved the request to bulkhead but denied the request to fill the interior two acres of wetlands. In its final agency decision, the Coastal Resources Commission (hereinafter CRC) held that the interior wetlands were not within a designated area of environmental concern. The CRC approved the permit application subject to certain identified conditions being included in the permit.

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The condition most pertinent to this appeal requires that prior to undertaking development, the applicant obtain "all required permits and approvals, including a Section 401 Water Quality Certification from the Division of Environmental Management."

The DEM denied the application for issuance of a Section 401 Water Quality Certification to the U.S. Corps of Engineers because the two-acre fill part of the project would violate the anti-degradation policy of the Environmental Management Commission (hereinafter EMC) by eliminating the existing use of the wetland as a nutrient and sediment filter. The EMC adopted the recommended decision of Administrative Law Judge Gray upholding the denial of plaintiff's request for a Section 401 Water Quality Certification.

On 10 December 1991, plaintiff filed a petition for judicial review in which she requested reversal of the final agency decision of the EMC and modification of the final agency decision of the CRC. On 29 July 1992, Judge Llewellyn entered an order that reversed the final agency decision of the North Carolina Department of Environment, Health and Natural Resources, Division of Environmental Management. Defendant appeals.

Wheatly, Wheatly, Nobles & Weeks, P.A., by C.R. Wheatly, III, for plaintiff-appellee.

Attorney General Lacy H. Thornburg, by Special Deputy Attorneys General Daniel F. McLawhorn and Francis W. Crawley, for defendant-appellant.

WELLS, Judge.

This appeal presents the question of whether the superior court erred by substituting its own judgment for that of the agencies in question when it reversed the EMC's final agency decision denying plaintiff's request for a Section 401 Water Quality Certification. We hold that the court did err and reverse.

In an order dated 29 July 1992, the superior court reversed the final agency decision of the North Carolina Department of Environmental Health and Natural Resources. In pertinent part, the court found that the findings of fact contained in paragraphs 28, 30 and 39 were in excess of the statutory authority of the agency, were not supported by substantial admissible evidence, and were arbitrary and capricious.

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The standard for judicial review is set forth in N.C. Gen. Stat. § 150B-51(b), which states that a reviewing court may modify or reverse an agency's decision if the substantial rights of the petitioner may have been prejudiced because the agency's findings, conclusions, inferences, or decisions are affected by other error of law, are unsupported by substantial evidence, or are arbitrary or capricious. N.C. Gen. Stat. § 150B-51(b). When it is alleged on appeal that the agency's findings, conclusions, or decisions are unsupported by substantial evidence or that they are arbitrary or capricious, then the proper standard of review is the whole record test. *Wiggins v. N.C. Dept. of Human Resources*, 105 N.C. App. 302, 413 S.E.2d 3 (1992). Our review of a final agency decision is limited to determining whether the trial court failed to properly apply the review standard set forth in N.C. Gen. Stat. § 150B-51. *In re Kozy*, 91 N.C. App. 342, 371 S.E.2d 778 (1988), *disc. review denied*, 323 N.C. 704, 377 S.E.2d 225 (1989). Therefore, the question on appeal is whether the trial court properly applied the whole record test in this case.

Under the whole record test, the reviewing court must examine all competent evidence to determine if there is substantial evidence to support the administrative agency's findings and conclusions. *Community Savings & Loan Association v. North Carolina Savings and Loan Commission*, 43 N.C. App. 493, 259 S.E.2d 373 (1979). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion, and is more than a scintilla or a permissible inference. *Thompson v. Board of Education*, 292 N.C. 406, 233 S.E.2d 538 (1977). The reviewing court should consider not only that evidence which supports the agency's result, but should also take into account contradictory evidence or evidence from which conflicting inferences could be drawn. *Id.*, 292 N.C. 406, 233 S.E.2d 538 (1977). Finally, the reviewing court must determine whether the administrative decision had a rational basis in the evidence. *Overton v. Board of Education*, 304 N.C. 312, 283 S.E.2d 495 (1981). Under the whole record test, the probative value of particular testimony is for the administrative agency to determine and this standard of review does not allow the reviewing court to substitute its judgment for that of the agency. *Webb v. N.C. Dept. of Environment, Health, and Natural Resources*, 102 N.C. App. 767, 404 S.E.2d 29 (1991). Additionally, the whole record test recognizes the special knowledge of the staff and the agency. *High Rock Lake Association v. N.C. Environ-*

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mental Management Commission, 51 N.C. App. 275, 276 S.E.2d 472 (1981).

Plaintiff contends that the agency's findings were unsupported by substantial evidence and were arbitrary and capricious. We disagree.

The record is replete with evidence in support of the agency's findings, and indeed each finding of fact was supported by testimony given at the administrative hearing. Finding of fact no. 28 concerned the identification of the two-acre area as an adjacent freshwater wetland and the manner in which its function as a filter for the nutrients and sediment protecting the shellfishing waters from deleterious effects would be lost if it were filled. Finding of fact no. 30 contained observations made by a wildlife biologist and a marine fisheries biologist from a site visit and their opinions as to the harmful effects that would result from filling the two-acre area. The wildlife biologist found that wildlife species commonly found in coastal wetlands would be expected to live in or use the wetland and that they would be displaced or killed by the proposed filling. The marine fisheries biologist concluded that significant adverse effects on the adjacent wetlands would occur if the area were filled. Finding of fact no. 39 stated that the DEM staff had concluded that reasonable alternatives to the preferred manner of developing the site existed which would reduce the magnitude of harm to the wetlands. Additionally, it concluded that plaintiff had conducted no investigation of alternatives and had made no showing that these alternatives were not practicable.

Site visits were made by DCM, DEM, and Corps of Engineers' employees with expertise in the area of wetlands. Based on these visits, reports were made and testimony was given that demonstrated that the area in question was only a few inches higher than the water table; that it had growing on it three species of vegetation typical of saturated soils; that it captured runoff from the interior portion of the eight-acre tract; that it acted as a filter to remove sediment and nutrients in the runoff and prevent them from entering the surrounding shellfish waters; and that this existing, beneficial use of the wetlands would be lost if the area were filled. In separate visits, biologists employed by the Wildlife Resources Commission and the Marine Fisheries Commission reached similar conclusions.

Under the whole record test, the probative value of testimony is for the agency to determine, and the reviewing court must not

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substitute its evaluation of the evidence for that of the agency. *Webb v. N.C. Dept. of Environment, Health, and Natural Resources*, 102 N.C. App. 767, 404 S.E.2d 29 (1991). Applying the principles of the whole record test to the record before this Court, substantial evidence of record supports the EMC's finding that the elimination of the wetland would lead to violation of the water quality standards in the waters in adjacent Topsail Sound and thus constitute the removal of a significant use of the wetland in violation of the antidegradation rule. Clearly, the findings of fact struck by the superior court were supported by substantial evidence and were neither arbitrary nor capricious. Therefore, we hold that the superior court erred by substituting its own judgment for that of the agencies in question. Since the State was the only party to file a notice of appeal, we do not reach the issues raised in plaintiff's cross-appeal.

For the reasons stated above, the order of the superior court is hereby

Reversed.

Chief Judge ARNOLD and Judge JOHNSON concur.

IN THE MATTER OF BARRY DUSTIN SWING v. JANICE GARRISON AND
ERNEST GARRISON, INTERVENORS/DEFENDANTS APPELLANT

No. 9222DC1298

(Filed 7 December 1993)

**Parent and Child § 25 (NCI4th)— custody of child in DSS—no
standing of grandparents to seek custody or visitation**

The provisions of N.C.G.S. § 50-13.1 do not grant grandparents in a Chapter 7A proceeding standing to seek custody or visitation of a child who has been placed in the custody of DSS after the child has been surrendered for adoption by one parent and the parental rights of the other parent have been terminated. N.C.G.S. § 7A-289.33.

Am Jur 2d, Parent and Child § 26.

IN RE SWING v. GARRISON

[112 N.C. App. 818 (1993)]

Appeal by intervenors/defendants from order entered 4 June 1992 in Davidson County District Court by Judge Jessie M. Conley. Heard in the Court of Appeals 28 October 1993.

Charles E. Frye III, for petitioner-appellee Davidson County Department of Social Services.

Morrow, Alexander, Tash, Long & Black, by C. R. "Skip" Long, Jr., for intervenor/defendant-appellants.

GREENE, Judge.

Janice Garrison and Ernest Garrison (grandparents), maternal grandparents of Barry Dustin Swing (Dustin), appeal from an order denying their motion for change of custody or visitation, and an independent evaluation of themselves and Dustin. Davidson County Department of Social Services (DSS) cross-assigns as error the trial court's denial of its motion to dismiss the grandparents' motion for change of custody or visitation.

On 29 December 1986, DSS filed a juvenile petition alleging Dustin, age nine months, was an abused and neglected child. The incident of abuse that gave rise to this petition occurred in the home of the grandparents while Dustin and his mother, Dawn Swing, resided in the grandparents' home. Dustin suffered a displaced fracture of the left humerus and a series of bruises to his face and back. Medical examination further revealed a fracture of the left tibia which was in the healing stage and estimated to be approximately two weeks old.

Upon DSS's petition, the trial court, on 13 January 1987, adjudicated Dustin to be a neglected juvenile and placed him in the legal and physical custody of DSS. On 10 February 1987, after review of this matter concerning Dustin, the trial court entered an order continuing legal and physical custody in DSS with temporary placement of Dustin with his maternal uncle and aunt. Because of their inability to continue to provide for Dustin, the trial court placed physical custody with the grandparents on 24 March 1987 while continuing legal custody with DSS. Dustin made an excellent adjustment with the grandparents and was attached to them, according to juvenile orders entered 22 September 1987, 23 February 1988, and 17 June 1988.

Although the grandparents met Dustin's physical needs, the constant conflict in their family between themselves and Dustin's

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mother, who resided intermittently with them, was of concern. Despite great efforts by DSS to work with the grandparents and Dustin's mother, including individual therapy, family therapy, weekly family conferences, contracts, and supervised as well as unsupervised visitation, DSS found the entire dysfunctional family could not provide a safe home for Dustin and therefore abandoned efforts to reunify Dustin with his mother and attempted to establish a relationship between Dustin and his biological father, Barry Swicegood. In a report to the court dated 30 August 1988, DSS noted that "[w]e feel that it would not be in [Dustin's] best interest to place [him] with the grandparents at this time because there remains a conflict between the mother and grandparents which has been detrimental to [Dustin] as [he has] witnessed and been involved in several altercations."

On 29 November 1988, the trial court ordered that legal and physical custody of Dustin be with DSS and charged DSS with placement responsibility of Dustin. On 3 July 1989, the court ordered Barry Swicegood and the grandparents to share physical custody of Dustin. The court subsequently amended this arrangement to allow the grandparents visitation with Dustin one weekend each month. The grandparents filed a civil action for custody of Dustin, which was dismissed on 9 November 1989 due to the pending juvenile action.

On 24 January 1990, the grandparents filed a Motion for Change of Custody of Dustin from Barry Swicegood to themselves; however, they withdrew this motion in February, 1990. Because Dustin experienced problems during visitation with his grandparents, culminating in Dustin's being physically abused during a weekend visit with them on 22-24 June 1990, the court stayed all visitation by order dated 5 July 1990.

On 8 January 1991, upon a petition filed by DSS, the court terminated the parental rights of Dustin's mother, Dawn Swing, continued legal and physical custody with DSS, and authorized DSS to give or withhold consent to adoption; however, placement of Dustin continued with his father, Barry Swicegood. On 4 October 1991, DSS filed a new juvenile petition alleging that Dustin was a neglected child due to Barry Swicegood's abuse of Dustin when he displayed defiant and oppositional behavior, and non-secure custody of Dustin was placed with DSS. In November, 1991, the grandparents filed a document titled "Supplemental Pleading to

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Motion for Change of Custody," seeking the care, custody, and control of Dustin or visitation should custody remain with DSS, and a motion to intervene in the ongoing juvenile proceeding concerning Dustin. Barry Swicegood executed a Parent's Release, Surrender, and General Consent to Adoption on 2 January 1992.

On 9 January 1992, DSS filed a motion to dismiss the grandparents' motion for custody and visitation which was denied by the trial court. On that same day, their motion to intervene was allowed. On 7 February 1992, DSS voluntarily dismissed the juvenile petition which was filed on 4 October 1991. This matter came on for hearing on January 9, February 7, March 26, June 1, and June 4, 1992 after which the trial court entered an order denying the grandparents' motion for change of custody or visitation and request for an independent evaluation or examination of themselves and Dustin, directing DSS to pursue either long-term foster care or adoption as a permanent plan for Dustin, and prohibiting the grandparents from contacting or communicating with Dustin or filing for an application for a foster home placement or pursuing adoption of Dustin.

The issue is whether the provisions of N.C. Gen. Stat. § 50-13.1 grant grandparents in a Chapter 7A proceeding standing to seek custody or visitation of a child who has been placed in the custody of the Department of Social Services after the child has been surrendered for adoption by one parent and the parental rights of the other parent have been terminated.

In 1981, our Supreme Court held that foster parents do not have standing to seek custody of a child placed in their home by the Department of Social Services after both parents of the child have, pursuant to N.C. Gen. Stat. § 48.9(a)(1), surrendered the child to a director of social services or to a licensed child-placing agency and have consented generally to adoption of the child. *Oxendine v. Department of Social Services*, 303 N.C. 699, 707, 281 S.E.2d 370, 375 (1981). The conclusion reached by the Court was based on the language of N.C. Gen. Stat. § 48-9.1(1) which the Court held vested custody "in the department or agency until the happening of one of the specified events" set forth in Section 48-9.1(1). *Id.*

Although the facts in the present case are somewhat different from those in *Oxendine*, a different result is not required. In

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Oxendine, both parents surrendered the child for adoption. In the present case, one parent surrendered the child for adoption and one parent's parental rights were terminated pursuant to Article 24B of Chapter 7A.

Pursuant to N.C. Gen. Stat. § 7A-289.33, which governs the effects of a termination of parental rights order, if the child had prior to the termination order

been placed in the custody of . . . a county department of social services . . . and . . . [was] in the custody of such agency at the time of such filing of the petition, . . . that agency shall, upon entry of the order terminating parental rights, acquire all of the rights for placement of said child as such agency would have acquired had the parent whose rights are terminated released the child to that agency pursuant to the provisions of G.S. 48-9(a)(1), including the right to consent to the adoption of such child.

N.C.G.S. § 7A-289.33 (1989). In this case, DSS had custody of Dustin both prior to and at the time of the filing of the petition to terminate the mother's parental rights. Thus, the entry of the order terminating the mother's parental rights vested in DSS the same rights they would have acquired had the child been released pursuant to Section 48-9(a)(1).

Because DSS has acquired all of the rights for placement of Dustin, by virtue of termination of one parent's parental rights and by virtue of the surrender to DSS by the other parent, the grandparents do not have standing "to contest the department['s] . . . exercise of its rights as legal custodian." *Oxendine*, 303 N.C. at 707, 281 S.E.2d at 375.

In so holding, we reject the grandparents' argument that *Oxendine* does not apply because at the time of the filing of their motion for custody or visitation, the father had not yet surrendered Dustin for adoption. The question of standing must be resolved in the context of this case at the time of the hearing of the motion, and at that time, the father had released the child for adoption. See *In re Bishop*, 92 N.C. App. 662, 671, 375 S.E.2d 676, 682 (1989) (trial court correctly considered evidence of events occurring after the filing of the petition to terminate parental rights).

For these reasons, we must sustain the cross-assignment of error by DSS and hold that the trial court erred in denying DSS's

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motion to dismiss the grandparents' motion for change of custody or visitation. We therefore vacate the trial court's order and remand for entry of an order granting DSS's motion to dismiss the grandparents' motion for change of custody or visitation.

Vacated and remanded.

Judges MARTIN and JOHN concur.

BETTY CONDOR BROOME v. EDGAR VESS BROOME

No. 9220DC1033

(Filed 7 December 1993)

1. Attorneys at Law § 38 (NCI4th)— motion of attorney to withdraw — denial proper

The trial court did not err in denying the motion by defendant's counsel to withdraw from the case, since defendant's lack of assistance alone was insufficient to show justifiable cause.

Am Jur 2d, Attorneys at Law §§ 173, 174.

2. Divorce and Separation § 119 (NCI4th)— classification of property as marital—no error

The trial court properly classified as marital property (1) a lot on Lake Wateree, since it was bought during the marriage and defendant could provide no proof that it was paid for with funds inherited from his father; (2) items bought from defendant's mother's estate, since there was no evidence that defendant paid for the items with his separate funds; and (3) an automobile which defendant alleged he bought during one of the parties' many separations, since defendant bought the car during the marriage and before the final separation leading to the divorce which triggered the equitable distribution of marital property.

Am Jur 2d, Divorce and Separation §§ 880 et seq.

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Appeal by defendant from judgment entered 14 May 1992 by Judge Kenneth W. Honeycutt in Union County District Court. Heard in the Court of Appeals 28 September 1993.

Plaintiff Betty Condor Broome brought this action on 12 October 1989, seeking an absolute divorce from defendant Edgar Vess Broome. At the time of the hearing, plaintiff was 62 years of age and employed by K-Mart, and defendant was 65 years of age. Defendant had retired from Kanawha Insurance in 1980 or 1981, at which time he had opened his own insurance business. In July 1989, defendant had sold his business. On 16 November 1989, plaintiff filed an amendment to the complaint seeking equitable distribution of marital property pursuant to N.C. Gen. Stat. § 50-20 (1987). In March 1992, after the parties' absolute divorce, the trial court held a hearing on plaintiff's claim for equitable distribution. Following that hearing, the trial court entered an order which, among other things: (1) classified certain property, including real property on Lake Wateree, a Cadillac Eldorado, and particular items of personal property, as marital; (2) determined that an equal distribution of property was equitable; and (3) ordered defendant to pay plaintiff the sum of \$44,719.99 plus interest. From this distribution award, defendant appeals.

Robert L. Huffman for defendant-appellant.

Perry and Bundy, by H. Ligon Bundy, for plaintiff-appellee.

MCCRODDEN, Judge.

On appeal, defendant raises (I) certain evidentiary and procedural issues, (II) issues pertaining to the classification of certain property as marital, and (III) the trial court's division of the marital property.

I.

Defendant contends that the trial court erred in denying his counsel's motion to withdraw from the case and his motions to continue the case and to introduce his equitable distribution affidavit into evidence. We find these arguments meritless.

[1] We first address whether the trial court erred in denying the motion by defendant's counsel to withdraw from the case. At the equitable distribution hearing, defendant's attorney requested that the court enter an order allowing him to withdraw as counsel,

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stating that defendant was not adequately assisting him in preparing for trial. An attorney, however, may not withdraw from a case without (1) justifiable cause, (2) reasonable notice to the client, and (3) permission of the court. *Smith v. Bryant*, 264 N.C. 208, 211, 141 S.E.2d 303, 305 (1965). Defendant has failed to articulate reasons in his brief why the trial court should have allowed the motion to withdraw. Defendant's lack of assistance alone was not sufficient to show justifiable cause, thus enabling counsel to withdraw from the case on the day that the matter was to be tried.

Likewise, we overrule defendant's argument that the court erred in denying his motion for a continuance of the hearing. A motion for continuance is addressed to the sound discretion of the trial judge and may be granted only for good cause shown and as justice may require. N.C. Gen. Stat. § 1A-1, Rule 40(b) (1990); *Austin v. Austin*, 12 N.C. App. 286, 297, 183 S.E.2d 420, 428 (1971). In the instant case, defendant has failed to make any showing of good cause why a continuance was necessary. On the contrary, the record reveals that defendant had ample notice of the trial date and previously had received a continuance. Defendant has provided, and we find, no good cause justifying an additional continuance. Hence, the trial court did not abuse its discretion in denying defendant's second motion for a continuance.

Defendant's challenge to the trial judge's refusal to allow him to introduce his equitable distribution affidavit into evidence is also without merit. The trial judge had ordered defendant to file his equitable distribution affidavit and serve it upon plaintiff no later than 27 March 1992. The judge stated in the order that, if defendant failed to do so, the classification and valuation of property would be determined as set forth in plaintiff's affidavit. Disregarding this order, defendant did not file or serve his affidavit on plaintiff by 27 March. Nonetheless, at trial he moved to introduce his equitable distribution affidavit into evidence, a motion the trial court properly denied. Moreover, in view of the fact that the trial court allowed defendant to testify at the hearing as to the information contained in his affidavit, we find that he has no cause to complain about the exclusion of the affidavit.

II.

[2] Defendant next challenges the trial court's classification as marital property of (1) the Lake Wateree property, (2) items of personal property defendant alleges he bought with funds from

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an inheritance from his father's estate, and (3) a 1976 Cadillac Eldorado. The trial court must classify property as either marital or separate depending upon proof as to the nature of the assets. *Atkins v. Atkins*, 102 N.C. App. 199, 206, 401 S.E.2d 784, 787 (1991). We rule that the court properly classified the property as marital.

N.C.G.S. § 50-20(b)(1) defines "marital property" as all real or personal property acquired by either spouse or both spouses during the course of marriage and before the date of separation of the parties, and presently owned, except property determined to be separate property. "Separate property" means all real and personal property acquired by a spouse before marriage or by bequest, devise, descent or gift during the course of the marriage. N.C.G.S. § 50-20(b)(2). Property acquired in exchange for separate property is separate property, as is income derived from separate property and increases in value of separate property. *Id.*; see *McLeod v. McLeod*, 74 N.C. App. 144, 147-48, 327 S.E.2d 910, 913, cert. denied, 314 N.C. 331, 333 S.E.2d 488 (1985). Effective 1 October 1991, the North Carolina General Assembly created a marital property presumption by rewriting section 50-20(b)(1) to add the following language: "It is presumed that all property acquired after the date of marriage and before the date of separation is marital property except property which is separate property under subdivision (2) of this subsection. This presumption may be rebutted by the greater weight of the evidence." N.C. Gen. Stat. § 50-20(b)(1) (Supp. 1992); see 2 Reynolds and Craig, *North Carolina Family Law* § 169.8 (5th Ed. Supp. 1993).

Defendant argues that the property on Lake Wateree in Kershaw County, South Carolina is his separate property since it was acquired by him in 1979, during the marriage, but with his separate funds. At the hearing defendant claimed that, knowing that he would receive an inheritance from his father's estate, he had borrowed funds from the Bank of Lancaster to purchase the Wateree property. Defendant acknowledges in his brief that both he and plaintiff had signed the promissory note for the loan, but alleges that he paid off the loan with his separate inheritance funds. Defendant, however, conceded that he had no documents or cancelled checks to prove the source of the funds used to pay off the loan. He did refer to the deed for the Wateree property which is titled only in his name as support for his argument that the land is his separate property. This reference is not persuasive.

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Johnson v. Johnson, 317 N.C. 437, 444, 346 S.E.2d 430, 434 (1986). Since the property was acquired while plaintiff and defendant were still married, defendant had to rebut the marital property presumption by the greater weight of the evidence. This he has failed to do. We, therefore, find no error in the trial court's conclusion that the Lake Wateree property is marital.

Defendant further argues that certain personal property acquired during the marriage was erroneously classified as marital property. Specifically, defendant refers to "numerous items" that he bought from his mother's estate, as well as a 1976 Cadillac Eldorado. Although he testified that he inherited \$2,591.67 from his mother's estate and "bought numerous items from [his] mother's estate and paid \$500.00 for them," the record is devoid of any indication that he paid for these items with his separate funds. In the absence of such evidence, the presumption that items purchased during the marriage were purchased with marital funds remains intact. N.C.G.S. § 50-20(b)(1).

Defendant maintains that the Cadillac Eldorado was his separate property because it was purchased during "one of . . . [the] many separations" of the parties. Section 50-20(b)(1) states that property acquired by either spouse during the course of the marriage and before *the* date of separation is marital property. We read this language to mean the separation leading to the divorce which triggers the equitable distribution of marital property. Hence, since defendant purchased this car during the marriage and before the date of the parties' final separation, the trial court properly classified it as marital property.

III.

In defendant's final arguments, he contends that the court erred in equally dividing the marital property between plaintiff and defendant and in providing a distributive award to plaintiff. These contentions are also without merit.

Section 50-20(c) provides that the court must divide marital property equally unless it determines that such division is not equitable. Although the court found that an equal division of property was equitable, defendant contends that an equal division was not appropriate because of his physical condition, age, and ability to earn an income which, he contends, the trial court did not consider. Although these may be factors for the court to consider,

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see N.C.G.S. § 50-20(c), defendant has neglected to explain why his physical condition, age, and ability to earn an income would require an unequal distribution of property. In fact, he declares in his brief that he “can cite no case to sustain his position, and further argument would be specious.” Thus, we find no error in the equal division of marital property.

Defendant’s challenge to the distributive award to plaintiff in the amount of \$44,719.99 relies upon his assertion that the Lake Wateree property was his separate property. Since we have ruled that the trial court properly classified this property as marital, we accordingly overrule this argument.

We also find no merit in defendant’s remaining assignments of error.

No error.

Judges JOHNSON and COZORT concur.

CHARLOTTE-MECKLENBURG HOSPITAL AUTHORITY, D/B/A CAROLINAS MEDICAL CENTER, PLAINTIFF-APPELLANT v. FIRST OF GEORGIA INSURANCE COMPANY, T. M. MAYFIELD & COMPANY, MATTHEW FULTZ, TAMMI BAUGHN AND MARK BAUGHN, DEFENDANTS-APPELLEES

No. 9226SC1280

(Filed 7 December 1993)

1. Liens § 4 (NC14th)— personal injury—lien on settlement funds—applicability only to funds paid to third person

Plaintiff hospital authority was not entitled to a lien on settlement funds disbursed to the injured defendants who received medical care at plaintiff’s facility, since the lien authorized by N.C.G.S. § 44-50 applies to funds paid to a third person in compensation for or settlement of personal injuries, but the funds in question here were paid, not to a third party, but directly to the injured parties.

Am Jur 2d, Liens §§ 40 et seq.

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2. Assignments § 2 (NCI4th) — personal injury — assignment of proceeds — assignment invalid

The assignment of the proceeds in a cause of action for personal injury is invalid, and defendants therefore were not obligated to honor an assignment to plaintiff hospital authority executed by the individual defendant who was treated for his injuries at plaintiff's facility.

Am Jur 2d, Assignments §§ 7 et seq.

Appeal by plaintiff from order entered 21 October 1992 in Mecklenburg County District Court by Judge H. William Constangy dismissing plaintiff's claim as to defendants First of Georgia Insurance Company, T.M. Mayfield & Company and Matthew Fultz. Heard in the Court of Appeals 27 October 1993.

Plaintiff provided medical treatment to Mark and Tammi Baughn. Mark Baughn was hospitalized from 8 May 1990 until 11 May 1990, during which time he incurred charges of \$2,997.77. Tammi Baughn was hospitalized from 8 May 1990 until 10 May 1990 and incurred charges of \$4,401.18. Mark Baughn executed an assignment to plaintiff of his right to any compensation or payment he received as a result of his injuries. Mark and Tammi Baughn asserted a personal injury claim against a third party whose automobile liability coverage was provided by defendant First of Georgia Insurance Company (First of Georgia). Defendant T.M. Mayfield & Company receives, processes, and pays insurance claims on behalf of First of Georgia. Defendant Matthew Fultz is employed by T.M. Mayfield & Company as an adjuster and conducted the investigation of the Baughn's personal injury claims.

On 21 May 1990, plaintiff sent Matthew Fultz, in his capacity as agent for T.M. Mayfield & Company and First of Georgia, written notice that plaintiff asserted a lien against all funds paid to any person in compensation for or settlement of the injuries for which Mark and Tammi Baughn received treatment at Carolinas Medical Center. Matthew Fultz settled the Baughn's personal injury claims for \$22,500.00, and First of Georgia sent the settlement funds to Matthew Fultz who disbursed \$8,500.00 to Mark Baughn and \$14,000.00 to Tammi Baughn. Plaintiff has not received payment for the services it rendered to the Baughns.

On 30 April 1992, plaintiff brought this action asserting claims against Mark and Tammi Baughn for failure to pay for medical

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services, and against First of Georgia, T.M. Mayfield & Company and Matthew Fultz for failure to honor plaintiff's lien and the assignment executed by Mark Baughn. On 22 May 1992, First of Georgia, T.M. Mayfield & Company, and Matthew Fultz moved to dismiss plaintiff's claim on the ground that the complaint failed to state a cause of action upon which relief could be granted. On 19 October 1992, the trial court entered default judgment against Mark Baughn, and plaintiff filed a motion for voluntary dismissal against Tammi Baughn. On 21 October 1992, the trial court entered an order dismissing plaintiff's claim as to First of Georgia, T.M. Mayfield & Company, and Matthew Fultz. Plaintiff appeals to this Court from the order dismissing plaintiff's complaint against First of Georgia, T.M. Mayfield & Company, and Matthew Fultz.

Turner Enochs & Lloyd, P.A., by Wendell H. Ott and Laurie S. Truesdell, for plaintiff-appellant.

Howard M. Widis for defendants-appellees First of Georgia Insurance Company, T.M. Mayfield & Company and Matthew Fultz.

WELLS, Judge.

Under the scope of our review of a motion to dismiss under Rule 12(b)(6) for failure to state a claim upon which relief can be granted, a complaint is deemed sufficient to withstand a dismissal so long as no insurmountable bar to recovery appears on the face of the complaint and the allegations of the complaint give adequate notice of the nature and extent of the claim. *Presnell v. Pell*, 298 N.C. 715, 260 S.E.2d 611 (1979). A complaint should not be dismissed under Rule 12(b)(6) "unless it affirmatively appears that plaintiff is entitled to no relief under any state of facts which could be presented in support of the claim." *Id.*

[1] Plaintiff contends in its first argument that the trial court erred in dismissing its claim against First of Georgia, T.M. Mayfield & Company, and Matthew Fultz because it was entitled to a lien on a portion of the settlement funds disbursed to Mark and Tammi Baughn. We disagree.

Sections 44-49 and 44-50 of the North Carolina General Statutes authorize medical provider liens upon recoveries for personal injuries to secure sums due for medical services. N.C. Gen. Stat. § 44-49 provides in pertinent part:

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From and after March 26, 1935, there is hereby created a lien upon any sums recovered as damages for personal injury in any civil action in this State, the said lien in favor of any person, corporation, municipal corporation or county to whom the person so recovering, or the person in whose behalf the recovery has been made, may be indebted for drugs, medical supplies, ambulance services, and medical services rendered by any physician, dentist, trained nurse, or hospitalization, or hospital attention and/or services rendered in connection with the injury in compensation for which the said damages have been recovered.

N.C. Gen. Stat. § 44-50 provides in pertinent part:

Such a lien as provided for in G.S. § 44-49 shall also attach upon all funds paid to any person in compensation for or settlement of the said injuries, whether in litigation or otherwise; and it shall be the duty of any person receiving the same before disbursement thereof to retain out of any recovery or any compensation so received a sufficient amount to pay the just and bona fide claims for such drugs, medical supplies, ambulance service and medical attention and/or hospital service, after having received and accepted notice thereof. . . .

We note first that these sections provide "rather extraordinary remedies in derogation of the common law, and, therefore, they must be strictly construed." *Ellington v. Bradford*, 242 N.C. 159, 86 S.E.2d 925 (1955). In *Insurance Co. v. Keith*, 283 N.C. 577, 196 S.E.2d 731 (1973), our Supreme Court held that although Sections 44-49 and 44-50 make an injured person's unpaid medical expenses a lien upon his recovery, these Sections impose no obligation upon the tortfeasor. If Sections 44-49 and 44-50 impose no obligation on the tortfeasor, then, *a fortiori*, there can be no obligation on the tortfeasor's insurer. The lien authorized by § 44-50 applies to funds paid to a *third person* in compensation for or settlement of personal injuries. *North Carolina Baptist Hosps., Inc. v. Mitchell*, 323 N.C. 528, 374 S.E.2d 844 (1988).

In the case *sub judice*, plaintiff sent notice to Matthew Fultz that it intended to assert a lien upon any funds paid to Mark and Tammi Baughn in compensation for or settlement of their injuries. Matthew Fultz, as an agent of T.M. Mayfield & Company and First of Georgia, settled the Baughn's personal injury claim for \$22,500.00. First of Georgia sent the settlement funds to Matthew

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Fultz who disbursed \$8,500.00 of the settlement funds to Mark Baughn and the remaining \$14,000.00 to Tammi Baughn. Plaintiff is not entitled to a lien on the funds in the hands of Matthew Fultz because payment was not made to a third party but directly to the injured party. We recognize that the rising cost of health care, caused in part by patients who do not pay for the medical treatment they have received, is a matter of significant public concern, but we "must interpret and apply statutes as they are written." *Montague Bros. v. Shepherd Co.*, 231 N.C. 551, 58 S.E.2d 118 (1950).

[2] Plaintiff contends in its second argument that First of Georgia, T.M. Mayfield & Company, and Matthew Fultz were obligated to honor the assignment executed by Mark Baughn. We cannot agree.

On 10 May 1990, Mark Baughn executed an assignment to plaintiff which provided in pertinent part:

[T]he undersigned hereby assigns to the Hospital Authority and each of its facilities that provided services to the patient all right, title and interest in and to any compensation or payment in any form that the undersigned received or shall receive as a result of or arising out of the injuries sustained by the patient resulting in the services provided, up to the amount necessary to discharge all indebtedness to the Hospital Authority for services rendered to the patient, whenever and wherever rendered.

There is no dispute that this assignment is an assignment of the proceeds from a cause of action for personal injuries. The validity of such assignments was considered by this Court in *North Carolina Baptist Hosps., Inc. v. Mitchell*, 88 N.C. App. 263, 362 S.E.2d 841 (1987). In *Mitchell*, Henry Clark was treated by plaintiff for injuries he sustained in an automobile accident. Mr. Clark incurred charges of \$27,579.69 for his treatment. Mr. Clark executed an assignment, worded almost identically as the assignment in this case, to plaintiff. Defendant settled Mr. Clark's personal injury claim for \$25,000.00 and distributed the proceeds as follows: \$6,250.00 to defendant for legal fees, \$5,812.50 to plaintiff for medical bills, \$3,562.50 for other medical bills, \$45.00 to an investigator, and the remaining \$9,330.00 to Mr. Clark. This Court held that for public policy reasons, long recognized under North Carolina law, the assignment of the proceeds in a cause of action for personal injury was invalid. On discretionary review, our Supreme Court did not reach the public

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policy considerations but stated that the only issue before it was whether an attorney who follows the disbursement provisions of N.C. Gen. Stat. § 44-50 when disbursing funds from a personal injury settlement could be held liable for a client's unpaid debt to a hospital. *North Carolina Baptist Hosps., Inc. v. Mitchell*, 323 N.C. 528, 374 S.E.2d 844 (1988). The Supreme Court held that defendant could not be held liable to plaintiff for failing to pay the hospital in accord with the terms of her client's assignment. The Supreme Court affirmed this Court on that ground only. Since the Supreme Court has not disavowed our public policy grounds in *Mitchell*, we are bound to follow that decision as it applies to this case. *North Carolina National Bank v. Virginia Carolina Builders*, 307 N.C. 563, 299 S.E.2d 629 (1983). Accordingly, the assignment executed by Mr. Baughn is void as against public policy, and the trial court properly dismissed the claim against First of Georgia, T.M. Mayfield & Company, and Matthew Fultz for failure to honor the assignment.

The order of the trial court dismissing plaintiff's claims is

Affirmed.

Chief Judge ARNOLD and Judge JOHNSON concur.

CLARENCE EARL MOORE, PLAINTIFF v. RONALD KINNON PATE, DEFENDANT

No. 9210SC1059

(Filed 7 December 1993)

**Rules of Civil Procedure § 41.1 (NCI3d)— voluntary dismissal—
after plaintiff rested—subsequent action dismissed**

The trial court correctly dismissed an action which had been filed within one year of a previous dismissal where plaintiff announced that he was giving notice of dismissal pursuant to Rule 41 without prejudice after the jury had deliberated for approximately two and a half hours; the court explained to the jury that plaintiff was taking a voluntary dismissal because the party bringing the lawsuit was entitled to do that and would have one year to decide whether to refile the suit; defendant never objected to the dismissal and no

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order was ever entered closing the file; the case was reviewed ten months later on a clean-up calendar and the judge ordered that the case be dismissed without prejudice; copies of the order were delivered to the parties, who were told that they had ten days to show cause why plaintiff's action should not be dismissed without prejudice; defendant did not object; plaintiff filed the current action within a year of the previous dismissal; and defendant moved to dismiss. The uncontroverted record reveals that plaintiff took his dismissal after he had rested his case and there is no evidence suggesting that a stipulation was entered into between plaintiff and defendant, so that plaintiff was unable to obtain a voluntary dismissal under N.C.G.S. § 1A-1, Rule 41(a)(1). Although plaintiff could have obtained a dismissal under Rule 41(a)(2), which requires an order of the trial court, there is no evidence that plaintiff took this avenue, and the North Carolina appellate courts have not embraced the federal option of allowing the court to treat a late notice of dismissal as a motion under Rule 41(a)(2). Even assuming this course would have been proper, no such order was entered by the court; the trial court's explanation to the jury was not an order. Moreover, no action by the court is necessary to give a voluntary dismissal effect, so that the judge who came upon the matter on the clean-up calendar had no authority to enter further orders.

Am Jur 2d, Dismissal, Discontinuance, and Nonsuit §§ 9-40.

Appeal by plaintiff from order entered 11 June 1992 by Judge Donald W. Stephens in Wake County Superior Court. Heard in the Court of Appeals 30 September 1993.

Mary K. Nicholson for plaintiff.

DeBank, McDaniel & Anderson, by Douglas F. DeBank, for defendant.

LEWIS, Judge.

The sole issue presented by this appeal is whether the trial court erred in granting defendant's motion to dismiss. We find no error and affirm the trial court. The record reveals that Clarence Earl Moore ("plaintiff") sued Ronald Kinnon Pate ("defendant") in case number 89-CVS-2249 for negligence arising from an automobile collision. There is no dispute that the underlying cause of action

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in 89-CVS-2249 and the present action is the same. The conflict arises as to whether or not plaintiff's present action is barred as a matter of law.

During the trial of 89-CVS-2249, plaintiff took a voluntary dismissal after both parties had rested and after the case had been submitted to the jury. After the jury had deliberated for approximately two and a half hours, plaintiff announced to the court that he was giving "notice of dismissal pursuant to Rule 41 without prejudice." In response the trial court stated: "All right. That ends the lawsuit." The trial court then summoned the jury and explained that plaintiff was taking a voluntary dismissal because "[u]nder civil rules and regulations, the party who brings a lawsuit is entitled to do just that if they wish to at any time and have within one year of that date to decide whether or not to refile the lawsuit." Defendant never objected to plaintiff's voluntary dismissal and no order was ever entered in the case closing the file.

After ten months with no activity, the case was scheduled for a clean up calendar. Judge Farmer reviewed the case file and ordered that the case be dismissed without prejudice. Copies of Judge Farmer's order were delivered to both parties who were informed that they had ten days in which to show cause why plaintiff's action should not be dismissed without prejudice. Again defendant did not object.

Finally on 4 March 1992, within a year of the previous dismissal, plaintiff filed the current action. Defendant moved to dismiss and a hearing was held before Judge Stephens on 11 June 1992. Judge Stephens dismissed plaintiff's complaint, ruling that 89-CVS-2249 had been dismissed with prejudice and that Judge Farmer had no authority to issue an order after the dismissal. Plaintiff appeals to this Court.

The rules regarding dismissals are contained in N.C.G.S. § 1A-1, Rule 41(a) and provide in pertinent part:

(1) By plaintiff; by Stipulation.—Subject to the provisions of Rule 23(c) and of any statute of this State, an action or any claim therein may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before the plaintiff rests his case, or; (ii) by filing a stipulation of dismissal signed by all the parties who have appeared in the

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action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice,

(2) By Order of Judge.—Except as provided in subsection (1) of this section, an action or any claim therein shall not be dismissed at the plaintiff's instance save upon order of the judge and upon such terms and conditions as justice requires. Unless otherwise specified in the order, a dismissal under this subsection is without prejudice.

With the change in the Rules of Civil Procedure, a plaintiff no longer has an absolute right to take a dismissal without prejudice after he rests his case. *See Cutts v. Casey*, 278 N.C. 390, 180 S.E.2d 297 (1971). The uncontroverted record reveals that plaintiff took his dismissal after he had rested his case, thus losing the ability to take a dismissal under Rule 41(a)(1)(i). There is no evidence suggesting that a stipulation was entered into between plaintiff and defendant allowing plaintiff to take an involuntary dismissal under Rule 41(a)(1)(ii). Thus, since plaintiff was unable to obtain a voluntary dismissal under Rule 41(a)(1), the only other means by which plaintiff could have taken his dismissal was under Rule 41(a)(2) which requires an order of the trial court and a finding that justice so requires. *See* 2 G. Gray Wilson, *North Carolina Civil Procedure*, § 41-3 (1989) (hereafter "Wilson"). Again there is no evidence that plaintiff took this avenue. Thus, plaintiff is left in the unenviable position of arguing that he should be allowed to take an involuntary dismissal without prejudice, when he has failed to follow any of the statutory options.

It is clear from our review of the record that plaintiff was seeking a dismissal under Rule 41(a)(1)(i). Under Rule 41(a)(1)(i) a dismissal is effective upon being filed and our courts have held that oral notice is sufficient to meet the "filing" requirement. *Johnson v. Hutchens*, 103 N.C. App. 384, 405 S.E.2d 597 (1991). Once a dismissal is requested under (a)(1) no court action is required. *Ward v. Taylor*, 68 N.C. App. 74, 314 S.E.2d 814, *disc. rev. denied*, 311 N.C. 769, 321 S.E.2d 157 (1984). However, given the late stage in the trial at which plaintiff sought his dismissal, a dismissal under Rule 41(a)(1)(i) was not available to him, regardless of the trial court's erroneous statements to the contrary.

Plaintiff attempted to save himself at oral argument by arguing that the dismissal was actually sought under Rule 41(a)(2), because there is no time limit on plaintiff's right to move for a dismissal

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under (a)(2). 2 Wilson, § 41-3. As one commentator has suggested, if notice is given too late the court may treat the notice as a motion under Rule 41(a)(2). *Id.* Although there is federal authority to support this position, see *Plains Growers, Inc. v. Ickes-Braun Glasshouses, Inc.*, 474 F.2d 250 (5th Cir. 1973), our research reveals that our appellate courts have not embraced this option. In fact, the Fourth Circuit has held that it was not error for a trial court to refuse to consider a belated (a)(1) dismissal as an (a)(2) dismissal. *Armstrong v. Frostie Co.*, 453 F.2d 914 (4th Cir. 1971). Therefore, even though it may have been proper for the trial court to have treated plaintiff's notice of dismissal as a motion under Rule 41(a)(2), we cannot say that it was error for the trial court not to have done so. According to Rule 41(a)(2), plaintiff is not allowed to take a dismissal unless such is ordered by the judge. Having reviewed the record, we find that no such order was entered by the trial court, and we disagree with plaintiff's assertion that the trial court's explanation of plaintiff's actions to the jury was an order of the court.

Plaintiff has also asserted that he is saved by Judge Farmer's entry of an order when the case appeared on the clean up calendar. Seeing that no order had been entered closing the file, Judge Farmer ordered that the case be dismissed without prejudice. Although it is certainly the better practice to require the filing of a notice of dismissal or some other action to close the file, no official action is necessary. 2 Wilson, § 41-2. Once a party takes a voluntary dismissal no action by the court is necessary to give the dismissal effect. *Carter v. Clowers*, 102 N.C. App. 247, 401 S.E.2d 662 (1991). In fact, once a party takes a voluntary dismissal no valid order can be entered thereafter except as to collateral matters. See *Collins v. Collins*, 18 N.C. App. 45, 196 S.E.2d 282 (1973). Therefore, when Judge Farmer came upon this matter on the clean up calendar he had no authority to enter any further orders. The matter had already been dismissed by plaintiff and that dismissal was effective upon its announcement. We are not persuaded by plaintiff's argument that since the rules do not specifically mandate that his dismissal was with prejudice, then the general rule applies and his dismissal was without prejudice. If we were to accept plaintiff's argument then we would return to the chaos the drafters sought to prevent when Rule 41 was amended. See N.C.G.S. § 1A-1, Rule 41 comment. Rules are made to be followed and plaintiff will not be allowed to prevail when he failed to take his dismissal at the

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proper time and in the proper manner. The judgment of the trial court is hereby

Affirmed.

Judges WELLS and MARTIN concur.

STATE OF NORTH CAROLINA v. LORETTA CONNARD GRIFFIN

No. 9310SC72

(Filed 7 December 1993)

Conspiracy § 21 (NC14th)— conspiracy to provide inmate with controlled substance—four counts—one ongoing conspiracy

The State's evidence in a prosecution for four counts of conspiring to provide an inmate with controlled substances showed only one ongoing conspiracy to deliver drugs to the women's prison and the court erred in submitting more than one count of conspiracy to the jury where the offenses transpired over a short period of time, the participants in the conspiracies for which defendant was indicted remain the same, the indictments all aver the same objective, delivering controlled substances to a particular inmate, and the State presented no evidence concerning the number of meetings which took place between defendant and the other participants. Although the State argued that four conspiracies existed because the offenses occurred one to two weeks apart and because the participants were different, a single conspiracy is not transformed into multiple conspiracies simply because its members vary occasionally and the same acts in furtherance of it occur over a period of time.

Am Jur 2d, Conspiracy § 11.

Appeal by defendant from judgment entered 5 May 1992 by Judge George R. Greene in Wake County Superior Court. Heard in the Court of Appeals 5 October 1993.

On 19 August 1991, a Wake County grand jury indicted defendant on eight counts of conspiracy to provide an inmate with a

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controlled substance and four counts of soliciting to provide an inmate with a controlled substance, all in violation of N.C. Gen. Stat. § 14-258.1(a) (Supp. 1992). Following a four day trial from 24 March through 30 March 1992, a jury found defendant guilty of four counts of conspiracy and three counts of solicitation. At a later sentencing hearing, the trial court consolidated for judgment all conspiracy convictions and for a second judgment, all solicitation convictions. From imposition of active sentences, defendant appeals.

Attorney General Michael F. Easley, by Assistant Attorney General V. Lori Fuller, for the State.

Bailey & Dixon, by Alan J. Miles, for defendant-appellant.

MCCRODDEN, Judge.

We address but one issue in this appeal: whether the trial court erred in denying defendant's motion to dismiss all but one of the conspiracy charges. Because we find that the State proved only one ongoing conspiracy, we must remand this case for resentencing on the conspiracy conviction.

The relevant facts are as follows. At the time of the alleged offenses, defendant was an inmate at the North Carolina Correctional Institution for Women (hereinafter "women's prison") in Raleigh. On 30 June 1991, prison officials caught defendant attempting to smuggle \$100.00 into the women's prison, a violation of the prison rules. As a result, defendant was placed in administrative segregation. Later that week, Amanda Penley, also an inmate at the women's prison, was found to be in possession of controlled substances, including Diazepam (commonly known as Valium), Alprezolan (commonly known as Zanax), and marijuana. The State Bureau of Investigation's investigation of the source of Penley's drugs led to the indictments in this case.

While testifying for the State, Amanda Penley stated that she and defendant had discussed how to make money while in prison and had decided to loan money and sell drugs to other inmates. Penley and defendant approached various inmates to request that they add defendant's family members to their list of visitors, so that they could be couriers of the drugs brought into the prison by the visitors. Penley further asserted that, as part of their plan, defendant contacted her father, William "Shorty" Connard, who lived in Gastonia. Shorty Connard would arrange to

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have a "package" brought to women's prison on regular Sunday visitation day. (Throughout the trial, the drugs brought to women's prison were referred to as a "package" because the drugs were packaged in a clear plastic bag wrapped in black tape.) Defendant's brother, Johnny Connard, or defendant's sister, Melissa Connard, usually brought the package to the prison and surreptitiously handed it to an inmate, who would then "suitcase" the package by inserting the package into a private body cavity, either the vagina or rectum.

Other inmates of women's prison who testified for the State included Sheila Faircloth, Elizabeth Owens, and Tina Yates. Each testified that defendant had asked them to accept packages of drugs smuggled into the prison by the visitors and that they had received the drugs and had given them to Amanda Penley. Additionally, Melissa Connard, who lived in Gastonia, testified that defendant had requested that she deliver drugs to Elizabeth Owens on visitation day. She alleged that her sister, the defendant, was supposed to be the ultimate recipient of the package.

Defendant contends that she could not lawfully be convicted of four counts of conspiracy to provide an inmate with a controlled substance on the facts in this case and that the trial court erred in submitting the four counts to the jury. In support of this, she argues that, although the State's evidence shows that drugs and money were delivered to the women's prison on at least four separate occasions during the month of June 1991, there was only a single scheme or plan to bring drugs into the prison. The State maintains, to the contrary, that there was sufficient evidence of four conspiracies to warrant submitting each of the conspiracy charges to the jury, and therefore, the four convictions should stand.

The essence of the crime of conspiracy is the agreement to commit a substantive crime. *State v. Medlin*, 86 N.C. App. 114, 121, 357 S.E.2d 174, 178 (1987). When the evidence shows a series of agreements or acts constituting a *single* conspiracy, a defendant cannot be prosecuted on multiple conspiracy indictments consistent with the prohibition against double jeopardy. *Id.* Therefore, when the State elects to charge separate conspiracies, it must prove not only the existence of at least two agreements but also that they were separate. *State v. Rozier*, 69 N.C. App. 38, 53, 316 S.E.2d 893, 902, *cert. denied*, 312 N.C. 88, 321 S.E.2d 907 (1984).

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Although the offense of conspiracy is complete upon formation of the unlawful agreement, the offense continues until the conspiracy comes to fruition or is abandoned. *Medlin*, 86 N.C. App. at 122, 357 S.E.2d at 179. A single conspiracy may, and often does, consist of a series of different offenses. *Id.* In *Rozier*, 69 N.C. App. at 52, 316 S.E.2d at 902, the Court stated that although there is no simple test for determining whether single or multiple conspiracies are involved in a particular case, "factors such as time intervals, participants, objectives, and number of meetings all must be considered."

Applying the four factors from *Rozier* to the facts in the instant case, we find that the State failed to prove more than one conspiracy. First, the offenses transpired over a short period of time, a one month period. Defendant was convicted of conspiring to deliver packages of controlled substances to the women's prison on 2, 9, 23, and 30 June 1991. Second, the indictments upon which defendant was convicted all allege conspiracies with Amanda Penley, Debra Furr (defendant's father's deceased girlfriend), and Johnny Connard; thus the participants in the conspiracies for which defendant was indicted remain the same. Additionally, these indictments all aver the same objective: delivering controlled substances to Amanda Penley. Finally, the State presented no evidence concerning the number of meetings which took place between defendant and the other participants.

The State argues that four separate conspiracies existed because the offenses occurred one to two weeks apart. Furthermore, the State claims that the four conspiracies constituted separate agreements because the participants were different. It refers us to parts of the record revealing that the contraband was smuggled into the prison by Johnny Connard, Melissa Connard, or Frank Metcalf and that it was received by Sheila Faircloth, Elizabeth Owens, or Tina Yates. The point is not well taken. A single conspiracy is not transformed into multiple conspiracies simply because its members vary occasionally and the same acts in furtherance of it occur over a period of time. *State v. Fink*, 92 N.C. App. 523, 532, 375 S.E.2d 303, 309 (1989). Moreover, as noted above, the four indictments under which defendant was tried for conspiracy all allege the same co-conspirators, placing a burden upon the State to show four separate agreements with these co-conspirators, not some other persons. See *State v. Mickey*, 207 N.C. 608, 178 S.E. 220 (1935); *State v. Minter*, 111 N.C. App. 40,

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432 S.E.2d 146 (1993). Although the State's brief recapitulates evidence about soliciting other inmates, not named in the indictment, to assist in the smuggling of controlled substances, it fails to identify, and we cannot find, evidence in the record that there were four separate agreements between defendant and the named co-conspirators. We, therefore, conclude that the State's evidence showed only one ongoing conspiracy to deliver drugs to the women's prison and that the court erred in submitting more than one count of conspiracy to the jury.

Since the conspiracy began on or before 2 June 1991, the earliest of the conspiracy convictions (91 CRS 52116) should stand, and the convictions for conspiracy based on the subsequent transactions must be vacated. *See Rozier*, 69 N.C. App. at 54, 316 S.E.2d at 903. Hence, we vacate the three judgments on the conspiracy convictions (91 CRS 52106, 91 CRS 52107, and 91 CRS 52108), and remand with instructions to the trial court to enter judgment on conspiracy to provide an inmate with a controlled substance for the first conviction (91 CRS 52116).

We have reviewed defendant's remaining assignments of error, and find no error. Accordingly, we overrule these arguments.

Vacated in part and remanded for resentencing.

Judges JOHNSON and COZORT concur.

BONNIE J. PADGETT, PLAINTIFF v. J. C. PENNEY COMPANY, INC.,
DEFENDANT

No. 9222SC1005

(Filed 7 December 1993)

**Negligence § 140 (NCI4th)— fall in department store—umbrella
in aisle—knowledge of dangerous condition**

The trial court properly granted summary judgment for defendant in a negligence action in which plaintiff alleged that she was injured when she tripped over an umbrella protruding several inches into an aisle from a display of umbrellas. Plaintiff failed to show that defendant was on actual or constructive

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notice of the protrusion of the umbrella box into the aisle, an essential element of plaintiff's claim.

Am Jur 2d, Premises Liability § 29.

Appeal by plaintiff from order entered 25 June 1992 by Judge Judson D. DeRamus, Jr., in Iredell County Superior Court. Heard in the Court of Appeals 16 September 1993.

Eisele & Ashburn, P. A., by Douglas G. Eisele, for plaintiff-appellant.

Golding, Meekins, Holden, Cosper & Stiles, by Lawrence W. Jones, of counsel, for defendant-appellee.

JOHNSON, Judge.

In this action, plaintiff alleges that personal injuries sustained when she tripped over an umbrella in a box at defendant department store were a result of defendant's negligence. Plaintiff argues that defendant knew or should have known that the protruding umbrella created a hazardous condition, and that defendant failed either to correct the hazard or to warn the plaintiff of the hazard.

Plaintiff and her husband were shopping at defendant department store on 24 February 1988. Plaintiff and her husband walked down an aisle in the men's department approximately three to four feet wide toward a men's underwear display located on a wall at the end of the aisle; while proceeding in this direction, plaintiff stumbled. Plaintiff testified that defendant "had a display of different styles of underwear up high and so I was looking up there . . . And I was looking up and I walked by and that's when I tripped on that box that was sticking out of that bin." Plaintiff stated further that "[w]hen I found the underwear, that's what I was looking for and what I was looking at. . . . I can't look at the underwear and at the—everywhere else at the same time." Plaintiff testified that she bumped into a yellow box; that when she fell, her husband "picked the thing up and slung it back into the thing and kicked it, and it didn't go all the way back in;" and that when her husband kicked it, it "was as far as it was going; it was, like, about maybe four inches or so."

Plaintiff's husband testified it was his opinion that the umbrellas or the boxes they were in protruded from a display bin six to eight inches into the aisle where he and plaintiff were walk-

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ing; that there was a distance of approximately eight inches from the floor to the bin containing the umbrellas; and that he did not see the umbrellas before his wife stumbled because they were both looking up at the display.

Plaintiff's sole argument on appeal is that the trial court erred in granting defendant's motion for summary judgment. For reasons which follow, we affirm the decision of the trial court.

Summary judgment is appropriate only when there is no genuine issue of material fact and a party is entitled to judgment as a matter of law. North Carolina General Statutes § 1A-1, Rule 56 (1990). The moving party has the burden of establishing the lack of any triable issue, and may meet this burden by proving that an essential element of the opposing party's claim is non-existent. All inferences of fact from the proof offered at the hearing must be looked at in the light most favorable to the nonmoving party. *Mozingo v. Pitt County Memorial Hospital*, 331 N.C. 182, 415 S.E.2d 341 (1992).

In reviewing the record, we must determine if plaintiff has made out a prima facie case of a breach of defendant's duty in order to properly submit it to the jury. The duty which defendant owes to plaintiff depends upon plaintiff's status; here, plaintiff was an invitee "because her purpose for entering the store was to purchase goods[.]" *Norwood v. Sherwin-Williams Co.*, 303 N.C. 462, 467, 279 S.E.2d 559, 562 (1981) (citations omitted). The duty defendant owed to plaintiff, as an invitee, was the duty to exercise ordinary care to keep its store in reasonably safe condition and to warn plaintiff of hidden dangers or unsafe conditions of which defendant had express or implied knowledge. *Id.*

In order to prove that defendant is negligent, plaintiff herein "must show that the defendant either (1) negligently created the condition causing the injury, or (2) negligently failed to correct the condition after actual or constructive notice of its existence." *Roumillat v. Simplistic Enterprises, Inc.*, 331 N.C. 57, 64, 414 S.E.2d 339, 342-43 (1992) (citations omitted). When the unsafe condition is attributable to third parties, the plaintiff "must show that the condition 'existed for such a length of time that defendant knew or by the existence of reasonable care should have known of its existence, in time to have removed the danger or [to have] given proper warning of its presence.'" *Id.* (Citations omitted.)

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Defendant's affidavit indicates that none of the floor managers on duty on 24 February 1988 were aware of a potentially hazardous condition on the sales floor, nor were they advised that such a condition existed. Further, defendant states that it is common practice for department stores to allow customers to handle merchandise prior to purchasing the merchandise, and that while every effort is made to do so, it is "impossible" for defendant or any other department store to immediately remedy every potentially hazardous situation created by a customer handling and then reshelving merchandise on the sales floor.

In the case herein, plaintiff failed to show that defendant was on actual or constructive notice of the protrusion of the umbrella box into the aisle, an essential element of plaintiff's claim. Further, plaintiff has not presented any evidence indicating for how long this condition occurred. Plaintiff has not proven this essential element of her case, that defendant knew or should have known of the existence of the dangerous condition. Therefore, plaintiff's claim fails.

Plaintiff argues that *Norwood* controls the outcome of this appeal. In *Norwood*, the plaintiff tripped over the edge of a display base which protruded three to four inches into an aisle. *Norwood* is distinguishable in that the evidence therein showed the defendant placed the display in such a position as "to attract and keep the customer's attention at eye level." *Norwood*, 303 N.C. at 469, 279 S.E.2d at 564. Further, the trial court in *Norwood* found plaintiff contributorily negligent as a matter of law. Here, plaintiff has simply failed to prove her prima facie case of negligence.

We find the trial court properly granted summary judgment on these facts.

The decision of the trial court is affirmed.

Judges COZORT and McCRODDEN concur.

WILKINSON v. SRW/CARY ASSOCIATES

[112 N.C. App. 846 (1993)]

GLADYS M. WILKINSON, PLAINTIFF v. SRW/CARY ASSOCIATES, A NORTH CAROLINA GENERAL PARTNERSHIP, AND TIMOTHY R. SMITH AND WIFE, ROSEMARY P. SMITH, AND JULIAN W. RAWL AND WIFE, BARBARA RAWL, DEFENDANTS

No. 9210SC1126

(Filed 7 December 1993)

**Mortgages and Deeds of Trust § 119 (NCI4th)— sale of land—
unsecured note—action against purchaser**

The trial court properly granted summary judgment for plaintiff in an action to collect the unpaid balance on an unsecured note given as partial payment for real property. The anti-deficiency statute, N.C.G.S. § 45-21.38, does not act to bar an *in personam* action where the promissory note is unsecured. In *Barnaby v. Boardman*, 313 N.C. 565, the noteholders were unsecured only because they had released the security which the buyers had given for the note, while the note in this case was never secured by a mortgage or deed of trust.

Am Jur 2d, Mortgages § 920.

Appeal by defendants from order entered 22 September 1992 by Judge Robert L. Farmer in Wake County Superior Court. Heard in the Court of Appeals 6 October 1993.

Pinna, Johnston, O'Donoghue & Burwell, P.A., by Roderick W. O'Donoghue, Jr., for plaintiff-appellee.

David S. Morris for defendant-appellants.

MARTIN, Judge.

On 20 March 1987 plaintiff agreed to convey approximately 155 acres of unimproved real property to defendant partnership SRW/Cary Associates in exchange for ten parcels of improved real property, \$50,000 in cash, and an unsecured promissory note in the principal sum of \$100,000. The promissory note provided on its face that it was given for the balance of the purchase price of a parcel of real property and was guaranteed by defendants Timothy R. Smith, Rosemary P. Smith, Julian W. Rawl, and Barbara Rawl. Mr. Smith and Mr. Rawl were partners in SRW/Cary Associates. Defendants did not pay the note in accordance with

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its terms and refused plaintiff's demand for payment of the outstanding balance and accrued interest.

Plaintiff thereafter commenced this action to recover the unpaid balance, accrued interest, and attorney fees. Plaintiff moved for summary judgment; at the hearing defendants orally moved for summary judgment. Plaintiff's motion for summary judgment was allowed; defendants' motion for summary judgment was denied. Defendants appeal.

All parties agree that the facts, as stated above, are not in dispute and that this is an appropriate case for summary judgment. Summary judgment is proper where there is no genuine issue of material fact and a party is entitled to judgment as a matter of law. N.C. Gen. Stat. § 1A-1, Rule 56(c). This appeal presents the question of whether G.S. § 45-21.38, North Carolina's so-called anti-deficiency statute, precludes the holder of an unsecured note, given as partial payment of the purchase price for real property, from bringing a suit to enforce the note upon the purchaser's default. We hold that it does not and affirm summary judgment for plaintiff.

By its terms, G.S. § 45-21.38 applies only to "sales of real property by mortgagees and/or trustees under powers of sale contained in any mortgage or deed of trust . . ." N.C. Gen. Stat. § 45-21.38. The statute acts to prohibit "the mortgagee or trustee or holder of the notes *secured* by such mortgage or deed of trust [from obtaining] a deficiency judgment on account of such mortgage or deed of trust or obligation *secured* by the same (emphasis added)." *Id.*

Simply stated, under the anti-deficiency statute a holder of a purchase money mortgage or deed of trust, upon foreclosure, is limited to recovery of the security or the proceeds from the sale of the security. The holder may not ignore his security and bring an *in personam* action against the mortgagor on the note secured by the deed of trust. Likewise, the holder may not bring an *in personam* suit against the mortgagor after foreclosure to recover the amount of the note left unsatisfied by the foreclosure. *Blanton v. Sisk*, 70 N.C. App. 70, 318 S.E.2d 560 (1984); *Bank v. Belk*, 41 N.C. App. 356, 255 S.E.2d 421, *disc. review denied*, 298 N.C. 293, 259 S.E.2d 911 (1979).

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The statute does not, however, act to bar an *in personam* action where the promissory note is unsecured. *Brown v. Owens*, 251 N.C. 348, 111 S.E.2d 705 (1959); *Blanton v. Sisk*, *supra*. In *Brown*, the plaintiff was a guarantor on an unsecured note given by the buyer as a down payment of the purchase price of a parcel of real property. When the note was defaulted, the seller sought to recover the unpaid balance from the plaintiff and the plaintiff filed suit to enjoin the seller's action on the ground that it violated the provisions of G.S. § 45-21.38. The Court held that G.S. § 45-21.38 had no application because the note was not "secured by a balance purchase price mortgage or deed of trust." *Brown*, 251 N.C. at 350, 111 S.E.2d at 707.

Defendants contend that *Brown v. Owens* is no longer sound authority because the North Carolina Supreme Court has, in *Barnaby v. Boardman*, 313 N.C. 565, 330 S.E.2d 600 (1985), expressly rejected the reasoning of *Brown v. Kirkpatrick*, 217 N.C. 486, 8 S.E.2d 601 (1940), the case relied upon by *Brown v. Owens*. We are not persuaded, however, that *Barnaby* requires reversal of the present case.

In *Barnaby*, the noteholders were unsecured only because they had released the security which the buyers had given for the note. Therefore, the Court reasoned that "[t]o allow them to release their security and then sue upon the note would give them the 'option' forbidden by the statute. Such a result would violate the intent of the General Assembly and, in effect, repeal the statute." *Barnaby*, 313 N.C. at 568, 330 S.E.2d at 602. The Court cited its conclusion in *Realty Co. v. Trust Co.*, 296 N.C. 366, 250 S.E.2d 271 (1979), that in enacting the anti-deficiency statute, "the Legislature intended to take away from creditors the option of suing upon the note in a *purchase-money mortgage transaction*." *Barnaby*, 313 N.C. at 568, 330 S.E.2d at 602 (emphasis added).

In the present case, plaintiff is not attempting to exercise an option which is forbidden by the statute. Because the note given by defendants was never secured by a mortgage or deed of trust, no purchase-money mortgage situation was ever created; G.S. § 45-21.38 is inapplicable and does not forbid plaintiff from bringing an *in personam* action against defendants for the unpaid balance of the note.

The individual defendants also contend that the protection of the anti-deficiency statute should be extended to them in their

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capacities as partner-guarantors and wives of the partner-guarantors. Since we have concluded that the provisions of G.S. § 45-21.38 are inapplicable to the facts of the present transaction, we need not consider the contentions of the individual defendants as to the extent of the protection provided by the statute when it does apply.

Affirmed.

Judges WELLS and LEWIS concur.

MARY FAULKENBERRY POSTON v. DWIGHT EDWARD POSTON

No. 9219DC1047

(Filed 7 December 1993)

1. Husband and Wife § 1 (NCI4th) — marriage vows—not civil contract—commercial contract principles not applicable

The trial court properly granted plaintiff-wife's motion for a dismissal under N.C.G.S. § 1A-1, Rule 12(b)(6) of defendant-husband's counterclaim for breach of contract in an action for divorce and equitable distribution where defendant contended that plaintiff could be sued for breach of the mutual obligations made at the marriage ceremony. Commercial contract principles are not applicable to the marriage vows.

Am Jur 2d, Husband and Wife §§ 5-7.

2. Trespass § 2 (NCI3d) — adultery — intentional infliction of emotional distress—not extreme and outrageous conduct

The trial court did not err in an action for divorce and equitable distribution by granting plaintiff-wife's motion for a dismissal under N.C.G.S. § 1A-1, Rule 12(b)(6) of defendant-husband's counterclaim for intentional infliction of emotional distress arising from plaintiff's adultery. Defendant's allegation of adultery does not evidence the extreme and outrageous conduct which is essential to this cause of action.

Am Jur 2d, Trial § 770.

POSTON v. POSTON

[112 N.C. App. 849 (1993)]

Appeal by defendant from order entered 29 July 1992 by Chief Judge Adam C. Grant in Cabarrus County District Court. Heard in the Court of Appeals 29 September 1993.

Barbara D. Hollingsworth, P.A., by Barbara D. Hollingsworth, for plaintiff-appellee.

Cruse and Spence, by Thomas K. Spence, for defendant-appellant.

WYNN, Judge.

Appellee brought action for absolute divorce and equitable distribution of marital property. Appellant filed an answer and counterclaims seeking damages for breach of the marriage contract and covenant and intentional infliction of emotional distress. The trial court granted appellee's motion to dismiss the counterclaims for failure to state a claim upon which relief could be granted. From that order, appellant appeals.

A motion to dismiss under N.C. Gen. Stat. § 1A-1, Rule (12)(b)(6) tests the sufficiency of a complaint to state a claim upon which relief can be granted. *Kuder v. Schroeder*, 110 N.C. App. 355, 430 S.E.2d 271 (1993); *Stanback v. Stanback*, 297 N.C. 181, 254 S.E.2d 611 (1979). Although the allegations of the complaint are taken as true, to withstand the motion the complaint must nevertheless be sufficient to satisfy the elements of at least some recognized claim. *Harris v. NCNB Nat'l Bank of North Carolina*, 85 N.C. App. 669, 355 S.E.2d 838 (1987).

[1] In his first counterclaim, appellant alleges appellee "notwithstanding her marriage vows and the marriage contract and covenant . . . has violated, and, presently, does violate the stipulations, agreements and conditions of the herein referred to contract and covenant." In his brief, appellant contends the mutual obligations made at the marriage ceremony are "between single persons who are about to enter into and are entering into the contractual status of husband and wife," and argues his wife can be sued for breach of this contract. We find no support in the law of this State for such a claim and therefore hold that the trial court properly dismissed this counterclaim.

It has long been held in this State that:

The marriage relation is a peculiar and important one. The courts treat it as a contract only in the sense that contract—

POSTON v. POSTON

[112 N.C. App. 849 (1993)]

consent of the parties — precedes it and is essential to its validity. But, when formed, it is more than a civil contract; it is a *relation*, an *institution*, affecting not merely the parties, like business contracts, but offspring particularly, and society generally.

State v. Hairston, 63 N.C. 451, 453 (1869).

We therefore conclude that commercial contract principles are not applicable to the marriage vows.

[2] In his second counterclaim, appellant charges that appellee “repeatedly exposed her mind and spirit and body to the sexual advances of a male resident of Rowan County, North Carolina.” Appellant contends this conduct caused him “extreme mental anguish, distress, anxiety, physical damage, emotional damage, and financial losses and damage.” Appellant asserts he met the requirements to establish a claim for intentional infliction of emotional distress and that the trial court erred in dismissing this claim. We disagree.

The elements of the tort of intentional infliction of emotional distress are: (1) extreme and outrageous conduct; (2) which is intended to cause and does in fact cause; (3) severe emotional distress. *Wilson v. Bellamy*, 105 N.C. App. 446, 414 S.E.2d 347, *disc. rev. denied*, 331 N.C. 558, 418 S.E.2d 668 (1992). Liability under this tort arises when the defendant’s “ ‘conduct exceeds all bounds usually tolerated by decent society’ and the conduct ‘causes mental distress of a very serious kind.’ ” *Stanback*, 297 N.C. at 196, 254 S.E.2d at 622 (quoting Prosser, *The Law of Torts*, § 12 (4th ed. 1971)).

We find that appellant’s allegation of adultery does not evidence the extreme and outrageous conduct which is essential to this cause of action. See *Johnson v. Bollinger*, 86 N.C. App. 1, 356 S.E.2d 378 (1987). See also *Ruprecht v. Ruprecht*, 252 N.J. Super. 230, 599 A.2d 604 (1991) (allegation that wife had engaged in adulterous affair for last eleven years of parties’ marriage does not state a cause of action for intentional infliction of emotional distress). Therefore the trial court properly dismissed this claim under Rule 12(b)(6).

For the reasons stated, the trial court’s order is

Affirmed.

Chief Judge ARNOLD and Judge JOHN concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 7 DECEMBER 1993

BROWN v. LEE No. 9220SC1078	Stanly (92CVS443)	Affirmed
CAMP v. NEIGHBOURS No. 9214SC908	Durham (90CVS576)	No Error
CANADY v. ONSLOW COUNTY No. 9210IC1158	Ind. Comm. (711903)	Affirmed
CHESSON-GIBSON v. TERRELL No. 9214SC1197	Durham (90CVS04480)	No Error
DUNCAN v. PIEDMONT AVIATION, INC. No. 9210IC494	Ind. Comm. (757256)	Affirmed
FOIL v. SHARPE No. 9211SC1225	Lee (89CVS01018)	No Error
HAWKS v. T. W. SERVICES, INC. No. 9220SC1115	Moore (90CVS897)	Reversed & Remanded
HUGHES v. CAMPBELL No. 9228SC955	Buncombe (91CVS416)	Affirmed in part, remanded in part
IN RE HOOSIER No. 9217DC1036	Surry (92J35)	Vacated & remanded
INSTITUTION FOOD HOUSE v. HALL No. 9228DC1169	Buncombe (91CVD643)	Affirmed in part, vacated and remanded in part
JONES v. GENERAL MOTORS CORP. No. 9212SC1020	Cumberland (92CVS816)	Affirmed
MABE v. PELLA WINDOW & DOOR CO. No. 9210IC1124	Ind. Comm. (963033)	Affirmed
MAX G. CREECH INS. & REALTY, INC. v. STANLEY'S TRANSFER CO. No. 9211SC1099	Johnston (90CVS206) (90CVD207) (90CVD208) (90CVD209) (90CVD211)	Affirmed
N.C. STATE BAR v. BURTON No. 9210NCSB948	NCSB (91DHC19)	Affirmed

RECTOR v. McCARTER No. 925SC441	New Hanover (87CVS3277)	Vacated & Remanded
ROGERS v. HELM No. 9210SC1131	Wake (91CVS07500)	Affirmed
ROSE v. STRUBLE No. 925DC790	New Hanover (91CVD1316)	Affirmed
STAFFORD v. CITY OF GREENSBORO No. 9218DC1194	Guilford (91CVD10312)	Affirmed
STATE v. ANDERSON No. 9226SC894	Mecklenburg (90CRS51996)	Remanded
STATE v. BARNES No. 9226SC1248	Mecklenburg (91CRS87750)	No Error
STATE v. BRASWELL No. 9326SC100	Mecklenburg (90CRS048116) (90CRS058302)	Affirmed
STATE v. CAMERON No. 9311SC313	Lee (91CRS10359)	No Error
STATE v. EDWARDS No. 936SC26	Northampton (92CRS1393)	No Error
STATE v. HALLMAN No. 9326SC11	Mecklenburg (92CRS19895) (92CRS19896) (92CRS19897) (92CRS19898)	No Error
STATE v. HUNTER No. 9312SC318	Cumberland (89CRS27657-Hunter) (89CRS27660-McCray)	Affirmed
STATE v. SKIPWITH No. 9321SC220	Forsyth (91CRS45735)	No Error
STATE v. SMITH No. 9314SC96	Durham (91CRS17905)	No Error
STATE v. STYLES No. 9325SC98	Burke (90CRS9009)	Affirmed
SWINSON v. WILKES No. 9210DC1283	Wake (91CVD05222)	Dismissed
TRUMPIE v. TRUMPIE No. 9221DC1121	Forsyth (90CVD7859)	Reversed
WILLIS v. P & G GRAIN CO. No. 9210IC1220	Ind. Comm. (924382)	Affirmed

APPENDIX

REMARKS BY JUDGE C. E. JOHNSON
ON THE OCCASION OF THE RETIREMENT OF
THE HONORABLE JUDGE H. A. WELLS

REMARKS BY JUDGE C. E. JOHNSON
ON THE OCCASION OF THE RETIREMENT OF
THE HONORABLE JUDGE H. A. WELLS

Court Session—1:00 p.m.

Wednesday, 11 May 1994

Good Afternoon.

I beg the indulgence of the Court for a few moments to make a brief statement concerning the impending retirement of Judge Wells. Today is the last day that Judge Wells sits as a member of a regular panel of this Court. Judge John and I are honored and privileged to be a member of this panel today. Not because it will be the last panel on which we sit with Judge Wells, but because it is always a privilege to be associated with him.

It is at times like this that I have mixed emotions about mandatory retirement for judges. Certainly, Judge Wells is capable and willing to provide several more years of dedicated service as a judge of this Court. However, mandatory retirement does not allow for exceptions. We acknowledge that this issue of mandatory retirement was fully litigated in the case of *Martin v. State of North Carolina*, 330 N.C. 412, 440 S.E.2d 474 (1991), so we must deal with things as they are. The N. C. Court of Appeals makes reversible errors, wherein, the N. C. Supreme Court makes irreversible errors.

With a degree of sadness to his colleagues, a distinguished judicial career of a very honorable man will soon come to a close. Judge Wells' tenure on this Court ends June 30, 1994 after fifteen (15) years of distinguished, dedicated and honorable service.

The judiciary, the North Carolina Supreme Court, the North Carolina Court of Appeals, the trial courts, the State Bar and the people of this great State are indebted to Judge Wells for his many years of dedicated service. Not only has he served with distinction and honor on this Court, but also as a practicing attorney, a member of the N. C. Utilities Commission, Vice-President and General Counsel for the N. C. Electric Membership Corporation, Counsel to the N. C. Utilities Review Committee of the N. C. General Assembly and as Executive Director of the Public Staff of the N. C. Utilities Commission.

In all of his activities as a member of this Court, he has acted with impartiality, objectivity, and fairness. He has acted with the

highest standards of conduct. He has upheld and preserved the integrity and independence of the judiciary, and the oath that every justice and judge of this State take, but unfortunately all do not keep.

When I was appointed to this Court in 1982 and to this very day, Judge Wells has been the stabilizing voice on this Court. He has always spoken with purpose, distinction and dedication; never becoming excitable and speaking solely with his tongue. In all of his remarks you will find that he allows his heart and mind to speak in place of his tongue. I have always been amazed at the calmness he displays, regardless of the situation confronting him. I recall only one private occasion in which he referred to someone with disparaging remarks, but would you believe he even said that with a smile! Through my association with him, I believe I have acquired his ability to display calmness in unusual circumstances. If you don't believe me, you can ask some of my colleagues.

Judge Wells, I am personally appreciative of your support and friendship throughout the years, and the privilege of having worked with you. I know that I speak for all of us in saying, Thanks! We'll miss you and we wish you the best in your retirement! As time turns our hair silver and many days pass, we will have golden memories of you to cherish.

Again, thank you.

ANALYTICAL INDEX



WORD AND PHRASE INDEX

ANALYTICAL INDEX

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SEARCHES AND SEIZURES

STATE

TAXATION

TRESPASS

TRIAL

UNFAIR COMPETITION

UNIFORM COMMERCIAL CODE

USURY

UTILITIES COMMISSION

ADMINISTRATIVE LAW AND PROCEDURE

§ 30 (NCI4th). Adjudication of "contested case" generally

The Office of Administrative Hearings lacked subject matter jurisdiction over a petition for a contested case hearing because the petition was filed beyond the 60-day time period specified by G.S. 150B-23(f), the OAH did not obtain jurisdiction by virtue of an earlier opinion of the Court of Appeals in the case, and petitioner's initial attack on the agency's decision in superior court did not toll the time for filing a contested case petition. **House of Raeford Farms v. State ex rel. Envir. Mgmt. Comm.**, 228.

Third parties may not seek a contested case hearing to challenge a DEHNR issuance of an air quality permit. **Empire Power Co. v. N.C. Dept. of E.H.N.R.**, 566.

§ 31 (NCI4th). Adjudication of contested case; notice and hearing

Petitioner's letter requesting that material be expunged from his record at the Board of Medical Examiners and indicating that he would be happy to meet with the Board in an informal conference was sufficient to trigger the contested case provisions of G.S. 150B-38. **In re Sullivan**, 795.

§ 47 (NCI4th). Declaratory rulings

Petitioner's request for a declaratory ruling was properly denied where the ruling would require the agency to determine the same issue determined in a contested case hearing as to whether a statute applied to petitioner's proposed open-heart surgery facility and whether a certificate of need was required. **Catawba Memorial Hospital v. N.C. Dept. of Human Resources**, 557.

The final agency decision which determined that petitioner's operating expenses for the first three years for an open-heart surgery facility would exceed one million dollars and that petitioner was therefore required to obtain a certificate of need was a judicial decision which barred, as res judicata, petitioner's complaint for a declaratory ruling as to the same issues. **Ibid.**

§ 54 (NCI4th). Judicial review under Administrative Procedure Act generally; jurisdiction

The superior court lacked jurisdiction to enter an order reversing the final decision of the DHR requiring petitioner to obtain a certificate of need prior to opening a new open-heart surgery facility. **Catawba Memorial Hospital v. N.C. Dept. of Human Resources**, 557.

§ 55 (NCI4th). Who are "aggrieved" persons entitled to judicial review under Administrative Procedure Act; injury required

A power company and a landowner were aggrieved parties entitled to judicial review of DEHNR's decision to grant an air quality permit to a second power company without requiring an environmental impact statement. **Empire Power Co. v. N.C. Dept. of E.H.N.R.**, 566.

§ 65 (NCI4th). Procedure on review; scope and effect of review generally

If appellant argues that an agency's decision was based on an error of law, a de novo review is required, and if an appellant questions whether the agency's decision was supported by the evidence or was arbitrary or capricious, the reviewing court must apply the whole record test, but on a subsequent appeal to the Court of Appeals of the trial court's order affirming the agency's decision, review is limited to a consideration of whether the court committed any error of law. **In re Appeal by McCrary**, 161.

ADMINISTRATIVE LAW AND PROCEDURE — Continued**§ 67 (NCI4th). Applicability of "whole record test"**

The trial court was required to apply the whole record test in determining whether the Insurance Commissioner's decision to deny coverage was contrary to the evidence presented. **In re Appeal by McCrary**, 161.

ADOPTION OR PLACEMENT FOR ADOPTION**§ 4 (NCI4th). Jurisdiction**

The superior court acquired jurisdiction of an adoption proceeding at the moment the clerk transferred the case because issues of fact and law regarding the natural parents' consent, DSS's consent, and a pending action in New Jersey became considerations. **In re Adoption of Duncan**, 196.

§ 43 (NCI4th). Modification or rescission of decree

The trial court could properly set aside the clerk's rescission of the interlocutory decree of adoption without finding an abuse of discretion or error of law by the clerk. **In re Adoption of Duncan**, 196.

ADVERSE POSSESSION**§ 2 (NCI4th). Actual, open, hostile, and continuous possession; hostile and permissive use distinguished**

The elements of adverse possession, including hostility, were met where the only elements of adverse possession actually disputed were hostile possession and time of possession; although plaintiff asserts that there cannot be hostile possession unless the true owner of the property is aware that he or she has an interest in the property, she was unable to offer any North Carolina authority to support her position; and it is clear that defendant's occupation and possession has been exclusive and without any recognition of plaintiff's rights. **Marlowe v. Clark**, 181.

§ 27 (NCI4th). Commencement and tolling of period of possession generally

Defendant continuously held the disputed tract for the statutory period to acquire the property by adverse possession under color of title. **Marlowe v. Clark**, 181.

APPEAL AND ERROR**§ 68 (NCI4th). Who is "party aggrieved" generally**

The Department of Revenue lacked standing to appeal from a judgment of imprisonment which included an order that cash seized during the arrest be forfeited and delivered to the School Board of Beaufort County because the Department was not a party to the underlying criminal action. **State v. Sneed**, 361.

§ 99 (NCI4th). Amendment of pleadings; order denying motion

The denial of a motion to amend an answer to add compulsory counterclaims and additional parties was immediately appealable. **House Healers Restorations, Inc. v. Ball**, 783.

§ 112 (NCI4th). Jurisdiction over person or property of defendant, or subject matter, generally

The denial of a motion to dismiss for lack of subject matter jurisdiction was appealable. **North Carolina Railroad Company v. City of Charlotte**, 762.

APPEAL AND ERROR — Continued**§ 121 (NCI4th). Orders relating to motions to dismiss; multiple claims or parties; appeal dismissed**

Plaintiff's cross-appeal from a partial summary judgment was interlocutory and not appealable where the judgment was in a multiple claim or multiple party action, was not certified for appeal by the trial court, and was not authorized by some other rule or statute. **North Carolina Railroad Company v. City of Charlotte**, 762.

§ 147 (NCI4th). Preserving question for appeal; necessity of request, objection, or motion

A defendant could not assign as error the introduction of DNA evidence in a rape trial where, upon motions by defendant, the court conducted a pretrial hearing at which only an F.B.I. expert testified, defendant did not offer testimony from his experts, and, in arguing the motions, defense counsel advised that he had decided to reserve to the jury the issue of the reliability of the F.B.I. testing. **State v. Futrell**, 651.

§ 155 (NCI4th). Effect of failure to make motion, objection, or request; criminal actions

Defendant's contention that the consolidation of two indictments against him into one count was improper was not before the appellate court where defendant failed to object to the consolidation, and consolidation did not amount to plain error. **State v. Almond**, 137.

§ 178 (NCI4th). Effect of appeals from interlocutory orders

The trial court's order granting summary judgment for defendant on its counterclaim was interlocutory and not subject to immediate appeal, and plaintiff's notice of appeal did not divest the court of jurisdiction to hear motions for prejudgment interest, late charges, and attorney's fees. **Beau Rivage Plantation v. Melex USA**, 446.

The trial court did not err in a child support case by proceeding to render a judgment on the merits after defendant had appealed from the denial of his motion to dismiss. **Wake County ex rel. Horton v. Ryles**, 754.

§ 210 (NCI4th). Service of notice of appeal in civil actions

The Court of Appeals did not have jurisdiction of an appeal because the record on appeal did not contain a sufficient certificate of service of the notice of appeal, but the Court treated the appeal as a petition for a writ of certiorari and granted the writ. **Munn v. Munn**, 151.

An attempted appeal was treated as a petition for certiorari where the record on appeal did not contain a certificate showing service of defendant's notice of appeal, but plaintiff acknowledged that defendant properly served it with notice of appeal. **National Fruit Product Company v. Justus**, 495.

§ 421 (NCI4th). Form and content of brief; appellant's brief

Petitioner's appeal is dismissed for violating appellate rules by intertwining the statement of facts, three questions for review, and all arguments. **Northwood Homeowners Assn. v. Town of Chapel Hill**, 630.

§ 446 (NCI4th). Review under theory of trial

Defendant's contention that the trial court erred by concluding that the codefendants were not partners in an action seeking payment of an amount owed

APPEAL AND ERROR — Continued

under a contract and damages for unfair or deceptive practices was not heard on appeal because defendant averred in his answer that no partnership existed. **Garlock v. Henson**, 243.

§ 447 (NCI4th). Issues first raised on appeal

Defendants could not raise for the first time on appeal their objection to the trial court's ex parte communications with the prosecutor while defense counsel was outside the courtroom. **State v. Almond**, 137.

ARREST AND BAIL**§ 115 (NCI4th). Police processing and duties upon arrest**

The trial court properly denied defendant's motion to suppress incriminating statements where defendant was arrested at approximately 1:05 p.m. and questioned until about 1:50 p.m., when he asked to see an attorney; he was told that the only attorney available was an assistant district attorney; he was left in the interrogation room until about 7:00 p.m.; and then he was taken with officers while they searched his apartment, during which time he made incriminating statements. **State v. Jones**, 337.

ASSIGNMENTS**§ 2 (NCI4th). Validity of assignments; rights and interests assignable**

The assignment of the proceeds in a cause of action for personal injury is invalid, and defendants were not obligated to honor an assignment to plaintiff hospital authority executed by the individual defendant who was treated for his injuries at plaintiff's facility. **Charlotte-Mecklenburg Hospital Auth. v. First of Ga. Ins. Co.**, 828.

ATTORNEYS AT LAW**§ 38 (NCI4th). Withdrawal from case**

The trial court did not err in denying a motion by defendant's counsel to withdraw from the case because of defendant's lack of assistance. **Broome v. Broome**, 823.

§ 45 (NCI4th). Proof of malpractice; applicable standard of care

Testimony by defendant attorney and his associate in a legal malpractice action that they did not publish a legal notice in the same newspaper used by other attorneys in their community was insufficient evidence of the standard of care for attorneys in that community. **Haas v. Warren**, 574.

AUTOMOBILES AND OTHER VEHICLES**§ 259 (NCI4th). Warranties of quality; relief available; liability**

Whether a manufacturer unreasonably refused to comply with G.S. 20-351.2 or G.S. 20-351.3 is a question for the jury when there is substantial evidence to support the claim. **Buford v. General Motors Corp.**, 437.

AUTOMOBILES AND OTHER VEHICLES — Continued

The trial court erred in directing a verdict for defendant on the issue of unreasonable noncompliance with the New Motor Vehicles Warranty Act. **Ibid.**

A trial court's order denying plaintiffs' request for attorney's fees in an action under the New Motor Vehicles Warranty Act was remanded where the determination of unreasonable noncompliance for purposes of trebling damages was also remanded for a jury determination. **Ibid.**

The trial court erred in an action under the New Motor Vehicles Warranty Act by ordering that plaintiff return the vehicle after the jury awarded a monetary verdict where the jury charge and the verdict form were both silent on this matter. **Ibid.**

§ 359 (NCI4th). Assumption on green light that others will obey traffic light

In an action to recover for injuries sustained by plaintiff pedestrian when defendants collided at a city intersection, the evidence was sufficient for the jury on the issue of the first defendant's negligence in failing to maintain a proper lookout where it tended to show that the first defendant was looking to his right and waving at a person in a taxi cab as he entered the intersection on a green light and such defendant failed to see the second defendant entering the intersection from his left against a red light. **Frugard v. Pritchard**, 84.

§ 440 (NCI4th). Negligence of owner in permitting incompetent or reckless person to drive

Where allegations of the complaint were based on the doctrine of respondeat superior and negligent entrustment and the agency relationship was admitted, the liability of defendant employer would rest on the doctrine of respondeat superior only and the negligent entrustment allegation would become irrelevant. **Frugard v. Pritchard**, 84.

An unlicensed sixteen-year-old decedent's own negligence in driving while voluntarily intoxicated rose to the level of defendant's negligence in entrusting an automobile to her, and plaintiffs' claim for negligent entrustment was barred by decedent's contributory negligence. **Meachum v. Faw**, 489.

§ 536 (NCI4th). Condition of driver; illness or loss of consciousness

Where the evidence tended to show that a driver lost control of a vehicle when he suffered a seizure, the trial court erred in instructing the jury on the doctrine of sudden emergency rather than the defense of unavoidable accident. **Giles v. Smith**, 508.

§ 542 (NCI4th). Pedestrian crossing other than at intersection or crosswalk

The trial court erred in an automobile negligence case by instructing the jury that plaintiff pedestrian was required to yield the right of way under G.S. 20-174(a); that statute was inapplicable because plaintiff was crossing a public vehicular area rather than a roadway. **Corns v. Hall**, 232.

§ 559 (NCI4th). Defense of contributory negligence; motorist's duty of care

The doctrine of contributory negligence has been followed in North Carolina since 1869; comparative fault is not the law of this State and it is beyond the Court of Appeals' authority to adopt the doctrine of comparative fault. **Corns v. Hall**, 232.

AUTOMOBILES AND OTHER VEHICLES — Continued**§ 614 (NCI4th). Contributory negligence of pedestrians; persons crossing at place other than crosswalk**

The evidence was not sufficient for a directed verdict on contributory negligence in an action where plaintiff was struck by defendant's pickup truck while walking across a traffic lane at a shopping center. **Corns v. Hall**, 232.

§ 829 (NCI4th). "Highway" and "public vehicular area" defined

The area where an accident occurred was a public vehicular area and not a roadway where plaintiff was struck by defendant's pickup truck as she and her husband left a Food Lion grocery store in a typical strip shopping center; there was a paved area approximately thirty feet wide between the stores and the parking lot; and that area consisted of a ten foot wide parcel pickup lane immediately in front of the store and a twenty foot wide traffic lane. **Corns v. Hall**, 232.

BURGLARY AND UNLAWFUL BREAKINGS**§ 10 (NCI4th). Occupancy**

The trial court correctly denied defendant's motion to dismiss charges of second-degree burglary where it was not disputed that defendant broke and entered a condominium at night with intent to commit a felony therein, that the condo was one of approximately seventy available for rent and had been rented on other occasions, and that the condo was not rented on that night. **State v. Hobgood**, 262.

CEMETERIES AND BURIAL**§ 23 (NCI4th). Desecration of graves**

The State must prove that a deceased person was interred in the cemetery at the time a proscribed act was committed in order to convict a defendant of defacing or desecrating a grave. **State v. Phipps**, 626.

CONSPIRACY**§ 18 (NCI4th). Conspiracy as distinguished from underlying substantive offense, generally**

The trial court did not err by denying defendant's motion to dismiss a charge of conspiracy to possess cocaine on the ground the conspiracy charge merged into the trafficking by possession charge or on the ground of insufficiency of the evidence. **State v. Baker**, 410.

§ 21 (NCI4th). Multiple conspiracies

The State's evidence in a prosecution for four counts of conspiring to provide an inmate with controlled substances showed only one ongoing conspiracy to deliver drugs to the women's prison and the court erred in submitting more than one count of conspiracy to the jury. **State v. Griffin**, 838.

CONSTITUTIONAL LAW**§ 52 (NCI4th). Standing to challenge constitutionality of statutes; requirement of membership in affected class**

A residential property owner had standing to challenge the constitutionality of the statute exempting from taxation property owned by certain homes for the

CONSTITUTIONAL LAW — Continued

aged, sick, or infirm on the basis that the statute discriminated against persons who own their property for private personal residences but lacked standing to challenge the statute on the basis that it discriminated against nonreligious, non-Masonic homes for the aged, sick, or infirm. **In re Appeal of Barbour**, 368.

§ 91 (NCI4th). Equal protection; requirement of uniform applicability

The statute granting tax-exempt status to certain homes for the aged, sick, or infirm does not discriminate against persons who own their property for residential purposes in violation of the constitutional rule of uniformity of taxation or in violation of the equal protection clause of the N. C. Constitution. **In re Appeal of Barbour**, 368.

§ 121 (NCI4th). Religious freedom; effect of Establishment Clause on State law

Statutes authorizing the Attorney General to commission as policemen the employees of certain public and private institutions or companies does not violate the Establishment Clause of the First Amendment because it permits employees of a religious institution, Campbell University, to be commissioned as policemen and thereby exercise the authority of the State. **State v. Pendleton**, 171.

§ 301 (NCI4th). What constitutes denial of effective assistance of counsel; failure to present particular evidence or witnesses

Defendant received effective assistance of counsel in a prosecution for embezzlement by a public officer where defense counsel did not present evidence but that decision did not constitute unreasonable professional judgment. **State v. Oxendine**, 731.

§ 328 (NCI4th). Speedy trial; good faith delays

Defendant was not denied his right to a speedy trial by a delay of eight and one-half months from the date of the first indictment to the date of the trial where much of the delay was the result of the State's attempt to have DNA sampling and other tests performed on defendant, and there was no evidence that the failure to send samples taken from defendant to the lab was willful. **State v. McClain**, 208.

§ 349 (NCI4th). Right to confrontation; cross-examination of witnesses

A rape defendant's Sixth Amendment right to confront witnesses was not violated by the admission of DNA test results where the lab technician who actually performed the tests did not testify at trial. **State v. Futrell**, 651.

§ 374 (NCI4th). Prohibition on cruel and unusual punishment; life imprisonment generally

A life sentence for first-degree sexual offense has been upheld as constitutional. **State v. Ramseur**, 429.

CORPORATIONS**§ 213 (NCI4th). Judicial dissolution generally**

The trial court did not err in refusing to allow defendant corporation to exercise its mandatory buy-out rights after determining that dissolution would be appropriate. **Foster v. Foster**, 700.

The trial court did not err by not holding a hearing on the valuation of defendant corporation's stock and assets after ordering dissolution of the corporation as allegedly contemplated in a pretrial order where the pretrial order stipulated

CORPORATIONS — Continued

that the only issue was whether the corporation should be dissolved; specific problems regarding implementation of the order can be brought to the attention of the court by motion as the problems arise. **Ibid.**

214 (NCI4th). Sufficiency of evidence to support judicial dissolution order

The trial court did not abuse its discretion by finding that the directors of a corporation were deadlocked and that grounds for dissolution of the corporation existed. **Foster v. Foster Farms, Inc.**, 700.

The trial court made insufficient findings to support its conclusion that a corporate dissolution was reasonably necessary to protect plaintiff's rights or interests. **Ibid.**

There was sufficient evidence for the trial court to find grounds for dissolving a corporation under G.S. 55-14-30(2)(iii) because the shareholders were deadlocked and failed for two years to elect successor directors; when the only two shareholders of a corporation also comprise its board of directors and the two shareholders/directors hold conflicting philosophies on how to operate and manage the business, there is no need to show that formal board of director meetings were held to attempt to elect new directors. **Ibid.**

COSTS**§ 11 (NCI4th). Effect of settlement offer**

An offer of judgment was not sufficient to invoke the charging of costs under G.S. 1A-1, Rule 68 where it was not specific as to the offer made to each plaintiff; however, the trial court did have full authority to tax costs to plaintiffs through its discretionary powers pursuant to G.S. 6-20. **True v. T & W Textile Machinery**, 358.

§ 34 (NCI4th). Actions to collect debts; notice requirement

Plaintiff lessee was given sufficient statutory notice to entitle defendant lessor to recover attorney's fees where the lessor's notice of default stated the lessor's intention to exercise its paragraph 19 remedies under the lease, and paragraph 19 provides for the recovery of attorney's fees. **Beau Rivage Plantation v. Melex USA**, 446.

COUNTIES**§ 36 (NCI4th). Liability of officers, agents, and employees**

The county commissioners of Guilford County could not be held personally liable at common law or pursuant to G.S. 128-10 for expenditures of county funds used to produce and distribute information concerning upcoming referenda involving redistricting for the election of county commissioners and merger of the public schools of Guilford County. **Bardolph v. Arnold**, 190.

COURTS**§ 19 (NCI4th). Stay of proceeding to permit trial in foreign jurisdiction**

There was no abuse of discretion in granting a stay under G.S. 1-75.12 in an action to determine insurance coverage while a similar action proceeded in South Carolina. **Lawyers Mut. Liab. Ins. Co. v. Nexsen Pruet Jacobs & Pollard**, 353.

The factors listed in *Motor Inn Management, Inc. v. Irvin-Fuller Dev. Co., Inc.*, 46 N.C. App. 707, for granting a stay under G.S. 1-75.12 are permissive, not

COURTS — Continued

mandatory, a court will not have abused its discretion in failing to consider each enumerated factor, and it is not necessary that the trial court find that all factors positively support a stay. However, a court will have abused its discretion if it abandons any consideration of these factors. *Ibid.*

The trial court's application of G.S. 1-75.12 to stay a North Carolina action while a related action proceeded in South Carolina did not violate the open courts provision of Article I, § 18 of the North Carolina Constitution. *Ibid.*

§ 132 (NCI4th). Conflict between state and federal laws generally

The trial court did not err by denying Norfolk Southern's motion to dismiss an action arising from a lease with the North Carolina Railroad Company where Norfolk Southern contended that its duty to provide interstate rail service was subject to the exclusive jurisdiction of the ICC, but this action turns on state law construction of a lease, a deed, and a contract. *North Carolina Railroad Company v. City of Charlotte*, 762.

§ 143 (NCI4th). Conflict of laws between states; tort actions, generally

The statute providing that the amount of workers' compensation benefits paid on account of an injury shall be admissible in any proceeding against the alleged tortfeasor governs in all actions by a plaintiff employee against a third party as a matter of law in North Carolina even where plaintiff has recovered workers' compensation under the laws of another state. *Frugard v. Pritchard*, 84.

CRIMINAL LAW**§ 106 (NCI4th). Information subject to disclosure by State; statements of State's witnesses**

Defendant was not prejudiced by failure of the trial judge to conduct his in camera review of witnesses' statements after each witness testified on direct examination so that defendant could have the statements for cross-examination where the court found that defendant had been provided all relevant statements of witnesses. *State v. Baker*, 410.

§ 261 (NCI4th). Continuance; insufficient time to prepare defense generally

Defendant was not denied a reasonable time to prepare his defense by the trial court's denial of defendant's two motions for continuance, one made four days before trial and one made the day of trial. *State v. Allen*, 419.

§ 305 (NCI4th). Consolidation of particular offenses; multiple sex charges or offenses

Charges of taking indecent liberties with a child and first-degree sexual offense could properly be joined for trial. *State v. Hammond*, 454.

§ 541 (NCI4th). Conduct or statements involving jurors; jury deliberations

Defendant was not denied a fair trial by the trial court's failure to inquire if the jury had begun deliberations before all the evidence was presented when a juror advised the court shortly after the trial began that some jurors were discussing the case during a recess where the court gave a curative instruction and defendant made no motion for mistrial. *State v. Najewicz*, 280.

§ 730 (NCI4th). Opinion of court on evidence; framing of instructions, generally

The trial court did not commit plain error by referring to the prosecuting witnesses as "victims" in the charge. *State v. Richardson*, 58.

CRIMINAL LAW — Continued

§ 762 (NCI4th). Definition of “reasonable doubt”; instruction omitting or including phrase “to a moral certainty”

The trial court's instructions on reasonable doubt amounted to plain error where the court used the terms “moral certainty” and “honest, substantial misgiving” in its instructions. *State v. Harper*, 636.

§ 817 (NCI4th). Instructions on corroborative evidence

The trial court did not err in instructing the jury that testimony “is being offered by the state to corroborate the testimony of a witness who has already testified” rather than limiting such testimony to the corroboration of certain child witnesses. *State v. Richardson*, 58.

§ 820 (NCI4th). Instructions on interested witnesses; State's witnesses generally

The trial court did not commit plain error in a rape case by failing to instruct the jury that the prosecutrix and her mother were “interested witnesses” after it had instructed that two defense witnesses were “interested” where defendant made no request for such an instruction. *State v. Najewicz*, 280.

§ 1060 (NCI4th). Evidence at sentencing hearing generally; inapplicability of formal rules

The trial court did not err at defendant's resentencing hearing in allowing evidence concerning other codefendants since formal rules of evidence do not apply and the evidence dealt directly with the circumstances surrounding the crimes for which defendant was convicted. *State v. Smallwood*, 76.

§ 1081 (NCI4th). Consideration of aggravating and mitigating factors; where mitigating factors outnumber aggravating factors

The trial court could properly find that the aggravating factor of defendant's preexisting charge of communicating threats to his victim outweighed three mitigating factors that defendant had no criminal convictions, suffered from a mental condition that reduced his culpability for the offense, and was a person of good character and reputation. *State v. Allen*, 419.

§ 1133 (NCI4th). Statutory aggravating factors; position of leadership or inducement of others to participate generally; facts indicative of defendant's role

The evidence was sufficient to support the trial court's finding as an aggravating factor for trafficking in cocaine that defendant induced others to participate in the commission of the offense. *State v. Smallwood*, 76.

§ 1158 (NCI4th). Statutory aggravating factors; use or armed with deadly weapon; same evidence used to support more than one factor

The trial court erred when sentencing defendant for second-degree rape by finding in aggravation that defendant was armed with a deadly weapon at the time of the crime and that defendant used a deadly weapon where both findings were supported by evidence that defendant possessed a knife at the victim's apartment. *State v. Futrell*, 651.

§ 1169 (NCI4th). Statutory aggravating factors; pretrial release as to other charges generally

The trial court may consider as an aggravating factor that defendant committed an offense while on pretrial release on a misdemeanor charge. *State v. Allen*, 419.

CRIMINAL LAW — Continued

§ 1182 (NCI4th). Statutory aggravating factors; proof of prior convictions

There was no merit to defendant's contention that he was never convicted of a resisting arrest charge in the district court because the case was appealed where the official record contained no indication that the conviction was ever appealed to the superior court. **State v. Smallwood**, 76.

§ 1269 (NCI4th). Statutory mitigating factors; good character or reputation; methods of proof

The trial court did not err in failing to find as a mitigating factor for trafficking in cocaine that defendant had a good reputation in the community where defendant's evidence consisted of letters stating that defendant was "a very good boy" who "got caught up with the wrong people" and who had "had some misfortune" and a letter from the Program Supervisor of the prison unit where defendant was incarcerated. **State v. Smallwood**, 76.

§ 1281 (NCI4th). Validity of habitual felon sentencing

Defendant's prosecution as an habitual felon neither denied him due process or equal protection nor subjected him to double jeopardy. **State v. Hodge**, 462.

The habitual felon statute is not unconstitutional as applied to defendant where the principal felony differed from the felonies which established him as an habitual felon. **Ibid.**

Conviction under the habitual felon statute does not violate a defendant's constitutional rights to equal protection, due process and freedom from double jeopardy. **State v. Smith**, 512.

§ 1283 (NCI4th). Indictment charging defendant as an habitual felon

An habitual felon indictment was not fatally flawed because it did not state specifically the name of the state or other sovereign against whom two of the previous felonies were committed where the indictment alleged that one felony was committed in "Wake County, North Carolina" and two other felonies were committed in "Wake County." **State v. Hodge**, 462.

Where defendant "William Michael Hodge" was charged with being an habitual felon, the trial court did not err in admitting the original file in another case in the name of "Michael Hodge" since the documents constituted prima facie evidence that defendant named in the file was the same as defendant before the court. **Ibid.**

Defendant was properly charged as an habitual felon in a separate indictment even though the charge of possession with intent to sell or deliver cocaine was contained in indictment 89 CRS 77510(A) and the habitual felon charge was contained in indictment 89 CRS 77510(B). **State v. Smith**,

Defendant was given sufficient notice of the prior felony conviction which would be used to convict him as an habitual felon even though the indictment alleged the date upon which defendant was sentenced for the prior crime rather than the date upon which he pled guilty. **Ibid.**

Either an arrest date or the date that prior felonies were actually committed is sufficient to give defendant notice of the specific felonies which are being alleged in an habitual felon indictment. **Ibid.**

There was no merit to defendant's contention that, once certain underlying convictions are used to convict an individual as an habitual felon, those same convictions may not be used again to enhance another conviction. **Ibid.**

CRIMINAL LAW — Continued**§ 1284 (NCI4th). Ancillary nature of habitual felon indictment**

There was no merit to defendant's contention that the habitual felon statute required that the indictment charging him with the underlying felony must also charge that he was an habitual felon and that he could not be charged in a separate indictment with being an habitual felon. **State v. Hodge**, 462.

DAMAGES**§ 49 (NCI4th). Mitigation of damages; when duty to mitigate arises**

The trial court did not err by denying defendant's motions for judgment n.o.v. and directed verdict in a legal malpractice action where defendant alleged that the proximate cause of plaintiff's losses was plaintiff's failure to enforce a note or a personal guaranty, but a reasonable person would have concluded that an attempt to enforce either would have been unsuccessful. **Smith v. Childs**, 672.

§ 56 (NCI4th). Collateral source rule; payments by employer

Evidence of workers' compensation benefits recovered by plaintiff pedestrian were admissible in an action to recover for injuries sustained when defendants collided at a city intersection. **Frugard v. Pritchard**, 84.

§ 127 (NCI4th). Punitive damages generally

Conduct by public safety officers in stopping and later arresting plaintiff did not amount to the actual malice necessary to sustain a claim for punitive damages. **Best v. Duke University**, 548.

§ 151 (NCI4th). What may be considered in determining damages generally

The trial court erred in its instructions on damages in a legal malpractice action involving a purchase money deed of trust and a personal guaranty where plaintiff's claim was based on several alleged acts of negligence and the instructions did not present the proper measure of damages under one of the theories; the jury was not instructed on the exclusive nature of the theories; and the jury was not charged to consider monies plaintiffs actually received from the sale of their land. **Smith v. Childs**, 672.

DEATH**§ 31 (NCI4th). Matters compensable**

The trial court properly dismissed plaintiff's claim in her individual capacity for loss of consortium on the ground that the wrongful death statute encompasses loss of consortium claims since any common law claim encompassed by the wrongful death statute must be asserted by the personal representative for the deceased. **Keys v. Duke University**, 518.

DEEDS**§ 60 (NCI4th). Restrictive covenants; effect of zoning ordinances**

Defendant's construction of a second building on her lot violated restrictive covenants even though the building may have been permissible under city zoning laws as an accessory structure. **Crabtree v. Jones**, 530.

DEEDS — Continued**§ 68 (NCI4th). Restrictive covenants; subdivision purchasers charged with notice**

Plaintiffs were on record notice that one lot in the subdivision had already been conveyed at the time they took title to their lots, and they were thus on notice that the prior deed contained a specific reference to a "BEACH" with a more limited description than the description contained in a later subdivision map. **Gregory v. Floyd**, 470.

§ 78 (NCI4th). Who may enforce restrictive covenant

Although restrictive covenants were subject to amendment by written agreement of the grantor and the owners of any lots to which the covenants applied, the covenants were enforceable by one lot owner against another lot owner where the covenants contained a statement that the restrictions could be enforced by "any lot owner or owners." **Crabtree v. Jones**, 530.

DIVORCE AND SEPARATION**§ 112 (NCI4th). Distribution of marital property; property subject to distribution, generally**

The statute providing for the interim transfer of "the use and possession" of a marital asset does not grant the trial court the authority to order the spouse in control of the marital assets to pay to the other spouse a lump sum cash award where such cash is not an existing marital asset. **Brown v. Brown**, 15.

§ 117 (NCI4th). Distribution of marital property; court's duty to classify property

The trial court's judgment of equitable distribution is reversed where the only findings supporting classifications of property were that the parties were married on 27 June 1975 and separated on 16 July 1990. **Hunt v. Hunt**, 722.

§ 119 (NCI4th). Classification of property; marital property, generally

The trial court properly classified as marital property a lot on a lake bought during the marriage, items bought from defendant's mother's estate, and an automobile which defendant allegedly bought during one of the parties' many separations. **Broome v. Broome**, 823.

§ 122 (NCI4th). Intrapousal gifts

The trial court in an equitable distribution action did not err in classifying half the money advanced from the wife's trust as a gift to the marital estate and the other half as a debt incurred by the marital estate. **Munn v. Munn**, 151.

§ 132 (NCI4th). Classification of property; shares of stock in closely held corporation

The trial court properly classified stock in a family-owned business as entirely marital property where the stock was purchased outright by plaintiff husband during the marriage with proceeds from a loan made by his mother rather than over time and the debt incurred to purchase the stock was thus a marital debt. **King v. King**, 92.

§ 140 (NCI4th). Valuation of marital property; partnerships

The trial court in an equitable distribution action did not err in valuing defendant's interest in an accounting partnership by the method provided in the partnership agreement for valuing the interest of a withdrawing partner, but the court erred by valuing the partnership interest on an after-tax basis. **Harvey v. Harvey**, 788.

DIVORCE AND SEPARATION — Continued**§ 165 (NCI4th). Distributive awards generally**

The trial court's distribution of marital property had a rational basis where it was based on findings, inter alia, as to the husband's salary, earning capacity and separate liabilities, the wife's income from her trust and past discretionary disbursements from the trust, the wife's lack of employment history, and the wife's contribution of large amounts of separate property to the marital estate. **Munn v. Munn**, 151.

§ 167 (NCI4th). Equitable distribution of pension, retirement, or deferred compensation benefits generally

The trial court did not err in distributing the parties' tax sheltered marital assets in accord with the parties' pretrial stipulations. **Harvey v. Harvey**, 788.

Defendant's partnership interest in an accounting partnership was subject to distribution under a QDRO even though it was not a pension or retirement fund. **Ibid.**

The trial court did not err in failing to account for and distribute gains which accrued on the parties' retirement benefits after the date of separation. **Ibid.**

§ 246 (NCI4th). Findings and evidence; dependency of spouse seeking alimony award

The court's findings only as to the parties' earnings could not support a conclusion that plaintiff was the dependent spouse or that defendant was the supporting spouse. **Hunt v. Hunt**, 722.

§ 290 (NCI4th). Which alimony awards may be modified or terminated

The evidence was sufficient to support the trial court's determination that a previous order and consent judgment entered into by the parties was not integrated and that the support provisions were modifiable. **Lemons v. Lemons**, 110.

§ 354 (NCI4th). Sufficiency of findings and evidence to support award of custody to mother

An award of child custody to plaintiff mother is reversed where the court made findings as to the unfitness of defendant father but failed to make any findings regarding the fitness of plaintiff mother. **Hunt v. Hunt**, 722.

§ 399 (NCI4th). Parents' ability to support child generally

There was sufficient evidence in the record to support the trial court's finding that the father, an ophthalmologist, was able to pay half of his children's support in an amount of \$1,300 per month. **Munn v. Munn**, 151.

The trial court properly ordered the father to pay retroactive child support for the period between the parties' separation and the date of trial where the evidence supported the court's finding that the father was financially able to pay half of his children's support during the time of separation. **Ibid.**

§ 520 (NCI4th). Counsel fees and costs; enforcement of separation agreement

There was no merit to plaintiff's contention that he had been the prevailing party under the parties' separation agreement in earlier actions and was thus entitled to attorney's fees as specified in the remedies provision of that agreement. **Brown v. Brown**, 619.

EASEMENTS

§ 9 (NCI4th). Creation by deed or agreement generally

An easement appurtenant was created as to an area identified as the "BEACH" on subdivision maps where the map was recorded and the deeds held by all purchasers of homes in the subdivision, except the deed to one husband and wife, referred to this subdivision map. **Gregory v. Floyd**, 470.

EMINENT DOMAIN

§ 34 (NCI4th). What constitutes "taking" of property generally

The obstruction of view of plaintiff's billboards due to the vegetation and trees planted by DOT as part of a highway beautification project did not amount to a taking of plaintiff's property by inverse condemnation. **Adams Outdoor Advertising v. N.C. Dept. of Transportation**, 120.

§ 122 (NCI4th). Losses in relation to business; value of business as going concern

The trial court in a condemnation action erred in allowing defense witnesses to give opinions regarding the value of defendants' land based entirely on the net income from the operation of defendants' plumbing business on the land. **Dept. of Transportation v. Fleming**, 580.

§ 287 (NCI4th). Inverse condemnation proceedings; allegations in regard to taking

The obstruction of view of plaintiff's billboards due to the vegetation and trees planted by DOT as part of a highway beautification project did not amount to a taking of plaintiff's property by inverse condemnation. **Adams Outdoor Advertising v. N.C. Dept. of Transportation**, 120.

ENVIRONMENTAL PROTECTION

§ 40 (NCI4th). Coastal areas; planning processes; local programs; development permits

The trial court erred in reversing the EMC's final agency decision denying plaintiff's request for a Federal Clean Water Act, Section 401 Water Quality Certification where substantial evidence supported the EMC's finding that the elimination of a wetland would lead to violation of the water quality standards in the waters in adjacent Topsail Sound. **King v. N.C. Environmental Mgmt. Comm.**, 813.

§ 63 (NCI4th). Air pollution; permit requirements

Third parties may not seek a contested case hearing to challenge a DEHNR issuance of an air quality permit. **Empire Power Co. v. N.C. Dept. of E.H.N.R.**, 566.

A power company and a landowner were aggrieved parties entitled to judicial review of DEHNR's decision to grant an air quality permit to a second power company without requiring an environmental impact statement. **Ibid.**

§ 71 (NCI4th). Water pollution; permits

A municipality could not assess penalties and costs against an industrial user where notice for the hearing was solely for the industrial user to present evidence to show cause why its permit to discharge wastewater should not be revoked. **House of Raeford Farms v. City of Raeford**, 522.

ESTATES

§ 61 (NCI4th). Cotenancy; creation

The trial court did not err by granting summary judgment for defendant on the issue of cotenancy; the mere assertion of a cotenancy relationship in plaintiff's complaint was not sufficient to defeat summary judgment when defendant offered evidence to the contrary. **Marlowe v. Clark**, 181.

ESTOPPEL

§ 13 (NCI4th). Equitable estoppel generally

A genuine issue of fact as to equitable estoppel of defendants to assert the statute of limitations was presented in an action for damages and injunctive relief based upon surface water and debris running from defendants' land onto plaintiffs' land where plaintiffs asserted that they delayed in bringing the action because defendants repeatedly promised to remedy the surface water drainage problems. **Miller v. Talton**, 484.

§ 14 (NCI4th). Equitable estoppel; silence

Equitable estoppel did not apply in an action to recover on a fire insurance policy where plaintiff alleged that defendant knew that plaintiff had transferred the house in question to her mother, plaintiff continued to pay premiums, and the policy did not mention that transfer of the property terminated her insurable interest. **Vance v. Wiley T. Booth, Inc.**, 600.

EVIDENCE AND WITNESSES

§ 110 (NCI4th). Habit

Proof of habit by evidence of specific instances of conduct is permitted by G.S. 8C-1, Rule 406; however, the trial court must make certain inquiries to determine the reliability and probative value of the proffered evidence before evidence of specific instances of conduct may be admitted to prove habit. **Crawford v. Favez**, 328.

The trial court did not abuse its discretion in admitting the testimony of defendant's former patients in a medical malpractice action where plaintiff alleged that defendant negligently prescribed a steroid without discussing possible side effects; the evidence at trial showed that defendant prescribed the drug to twenty-six patients; and five of those former patients testified at trial that defendant had described the possible side effects of the drug. **Ibid**.

§ 120 (NCI4th). Rape victim's sexual behavior generally; purpose of Rape Shield Statute

The trial court did not err by failing to allow defendant to cross-examine an alleged rape victim as to whether she had made any previous claims of rape because defendant failed to properly present this issue to the trial court. **State v. Najewicz**, 280.

§ 122 (NCI4th). Determining relevancy of rape victim's sexual behavior; in camera hearing

The trial court did not err by providing to the State a transcript of defendant's testimony at an in camera hearing held pursuant to the Rape Shield Statute. **State v. Najewicz**, 280.

EVIDENCE AND WITNESSES — Continued**§ 218 (NCI4th). Subsequent remedial measures**

In a tort claim action to recover for the wrongful death of plaintiff's husband who slipped and fell to his death at a waterfall in a state park, the hearing commissioner did not err by excluding exhibits which showed remedial measures taken by the State at the park subsequent to the accident. **Smith v. N.C. Dept. of Nat. Resources**, 739.

§ 650 (NCI4th). Introduction and consideration of evidence; finding of fact requirement

Findings of fact were not required to support the trial court's denial of defendant's motions to suppress DNA evidence in a rape trial where defendant presented no evidence at the voir dire hearing and the testimony of the State's witness did not support defendant's contention regarding the unreliability of F.B.I. methodology. **State v. Futrell**, 651.

§ 694 (NCI4th). Offer of proof; necessity for making record of excluded evidence

The exclusion of testimony by defendant's supervisor in response to defendant's question seeking her opinion as to whether defendant was "capable of raping anyone" was not presented for appellate review where the record fails to show what the testimony of the witness would have been and the answer of the witness was not apparent from the context of the question. **State v. Najewicz**, 280.

§ 962 (NCI4th). Statements for purposes of medical diagnosis or treatment; medical personnel to which exception applies

Statements made by child sexual assault victims to a mental health consultant at the UNC Children's Hospital were admissible under the medical diagnosis and treatment exception to the hearsay rule where the witness's interviews of the children were conducted to assist a physician who diagnosed both children as being victims of sexual trauma. **State v. Richardson**, 58.

A victim's assistance counselor's testimony regarding a picture drawn by a child rape and sexual offense victim and the child's description of the drawing written thereon by the counselor were properly admitted under the medical diagnosis and treatment exception to the hearsay rule. **State v. Hammond**, 454.

§ 969 (NCI4th). Exceptions to hearsay rule; public records, reports, vital statistics, and the like

The trial court properly admitted tax department records under the public records exception to the hearsay rule in a prosecution for embezzlement by a public officer where the collection supervisor of the tax department identified the records as belonging to the tax department and testified that each record was generated and maintained by the tax department. **State v. Oxendine**, 731.

§ 1255 (NCI4th). Invocation of right to counsel; post-invocation communication initiated by defendant

The trial court properly denied defendant's motion to suppress his inculpatory statement in a prosecution for breaking and entering and larceny where defendant, who had asked to see an attorney during questioning at the police station, was taken with officers while they searched his apartment, defendant was handcuffed and seated on a couch with a detective, there was general conversation between defendant and the detective, and defendant said that he would show officers which items were stolen after he saw that the whole process was upsetting his girlfriend and daughter and making them cry. **State v. Jones**, 337.

EVIDENCE AND WITNESSES — Continued**§ 1299 (NCI4th). Confessions; subnormal mentality; inability to appreciate import of confession**

The trial court's findings supported its conclusion that the fifteen-year-old mentally retarded defendant knowingly and intelligently waived his juvenile and Miranda rights prior to custodial interrogation. **State v. Brown**, 390.

§ 1623 (NCI4th). Authentication and foundation; requirements for tape recordings

A tape of defendant's conversation with his coconspirators was properly authenticated where both coconspirators testified that the tape was a fair and accurate recordation of their conversation with defendant. **State v. Baker**, 410.

§ 1874 (NCI4th). Necessity that fingerprints could only have been made at time of crime

The trial court did not err in a rape prosecution by admitting evidence that defendant's fingerprints were found on a window screen; whether fingerprints could have been impressed only at the time of the particular crime is ordinarily a question of fact to be determined by the jury, not a question of law to be determined by the court prior to the admission of fingerprint evidence. **State v. Futrell**, 651.

§ 1994 (NCI4th). Parol or extrinsic evidence affecting writings; contracts, leases, and agreements generally

The trial court erred by excluding parol evidence of representations made during prelease negotiations from an action for breach of a lease by nonpayment of rent in which the tenant asserted that the landlord had breached the lease by changing the property from a mall to offices. **IRT Property Co. v. Papagayo, Inc.**, 318.

§ 2047 (NCI4th). Opinion testimony by lay persons generally

Opinion testimony by defendant's supervisor as to whether defendant was "capable of raping anyone" was properly excluded because there was no foundation showing that the opinion called for was rationally based upon the perception and observations of the witness. **State v. Najewicz**, 280.

There was no prejudicial error in a prosecution for first-degree sexual offense involving defendant's eight year old daughter where the trial court excluded testimony that defendant ". . . could not do anything like this." **State v. Ramseur**, 429.

§ 2150 (NCI4th). Opinion testimony by experts; opinion as to ultimate issue; claimed invasion of province of jury

The trial court erred in a legal malpractice action by allowing plaintiff's expert to testify as to legal conclusions regarding a purchase money deed of trust and personal guaranties; while legal experts may testify regarding the factual issues facing the jury, they are not allowed to interpret the law or to testify as to the legal effect of particular facts. **Smith v. Childs**, 672.

§ 2152 (NCI4th). Opinion as to question of law

Opinion testimony by defendant's supervisor as to whether defendant was "capable of raping anyone" was properly excluded because the word "raping" is a legal term of art not readily apparent to the witness. **State v. Najewicz**, 280.

The trial court erred in a legal malpractice action by allowing plaintiff's expert to testify as to legal conclusions regarding a purchase money deed of trust and personal guaranties. **Smith v. Childs**, 672.

EVIDENCE AND WITNESSES — Continued**§ 2170 (NCI4th). Basis or predicate for expert's opinion; necessity of either actual knowledge or assumed facts**

An expert need not base his opinion upon personal knowledge as long as the basis for his or her opinion is available in the record or available upon demand. **State v. Futrell**, 651.

§ 2211 (NCI4th). DNA analysis

The trial court did not err in a prosecution for second-degree rape and assault on a female by admitting evidence of DNA profile testing. **State v. Futrell**, 651.

§ 2332 (NCI4th). Experts in child sexual abuse; characteristics and symptoms of abuse, generally

The trial court did not err in admitting expert testimony concerning general characteristics of sexually abused children, behavioral problems in those who have been abused, and children's disclosure patterns. **State v. Richardson**, 58.

The trial court did not err in allowing an expert witness to discuss the symptoms and characteristics of sexually abused children and to express her expert opinion as to whether a minor child exhibited such characteristics. **State v. Hammond**, 454.

§ 2335 (NCI4th). Characterization of event as attack or molestation; shorthand statement of fact

The trial court did not err in admitting the testimony of a pediatrician who was an expert in the diagnosis of child sexual abuse that the victims had been sexually molested. **State v. Richardson**, 58.

§ 2452 (NCI4th). Quashing, vacating, or modifying subpoena duces tecum

The trial court did not err in quashing a portion of defendants' subpoenas duces tecum where the subpoenas were really discovery devices intended to circumvent the normal discovery process. **State v. Almond**, 137.

§ 3076 (NCI4th). Inconsistent or contradictory statements; defendant

The State was properly permitted to impeach defendant's trial testimony by use of his prior inconsistent testimony at an in camera hearing held under the Rape Shield Statute. **State v. Najewicz**, 280.

FALSE IMPRISONMENT**§ 8 (NCI4th). Commitment to mental institution**

Plaintiff's forecast of evidence on a false imprisonment claim arising from the involuntary restraint of plaintiff in Butner Hospital was insufficient to create a genuine issue of material fact as to whether defendants followed the requisite procedures or whether the decision to restrain plaintiff was an exercise of professional judgment. **Alt v. Parker**, 307.

FALSE PRETENSES, CHEATS, AND RELATED OFFENSES**§ 5 (NCI4th). Indictment and warrant; merger with other offenses; joining charges**

The trial court did not deny defendant his right to a unanimous verdict when it consolidated two indictments for obtaining property by false pretenses into one count. **State v. Almond**, 137.

FALSE PRETENSES, CHEATS, AND RELATED OFFENSES — Continued**§ 18 (NCI4th). Sufficiency of evidence generally**

There was sufficient evidence of misrepresentations and of the causal relationship between the misrepresentations and defendant's receipt of moneys where defendant, as purchasing agent for his company, authorized inflated invoices to be paid and received kickbacks from the inflated amounts. **State v. Almond**, 137.

FIDUCIARIES**§ 29 (NCI4th). Compensation generally; amount**

When a trustee of a deed of trust who is also a licensed attorney performs extraordinary services as described in G.S. 32-51 in connection with a foreclosure proceeding, the trustee is entitled under G.S. 45-21.20 to an award of attorney's fees as an expense incurred with respect to the sale or proposed sale, but the trial court must make findings as to the attorney's skill, his hourly rate, its reasonableness, what he did, and the hours he spent. **In re Foreclosure of Newcomb**, 67.

GUARANTY**§ 17 (NCI4th). Discharge of guarantor**

A material alteration of the contract between the principal debtor and creditor without the guarantor's consent will discharge the guarantor; however, the defendants in this case waived any defense of discharge by executing an agreement which provides that modifications will not discharge defendants. **First Citizens Bank & Trust Co. v. McLamb**, 645.

HIGHWAYS, STREETS, AND ROADS**§ 32 (NCI4th). Outdoor Advertising Control Act, generally**

The temporary exposure of a junkyard to view by highway construction work was sufficient to render an unzoned area commercial for purposes of the Outdoor Advertising Control Act even though the junkyard would eventually have to be screened from view or removed under the Junkyard Control Act. **Naegele Outdoor Advertising v. Harrelson**, 98.

HOMICIDE**§ 365 (NCI4th). Lesser offenses to second-degree murder; reckless but unintentional act**

The trial court erred in a second-degree murder prosecution by refusing defendant's request to instruct the jury on involuntary manslaughter where defendant testified that the victim was killed when she reached for the pistol in an attempt to prevent the victim from committing suicide. **State v. Tidwell**, 770.

§ 523 (NCI4th). Instructions; malice

The trial court erred in a second-degree murder prosecution by not giving defendant's requested instruction that the jury could find from the evidence that defendant had reconciled with the victim and that any malice shown by defendant's previous threats could no longer be attributed to the killing. **State v. Tidwell**, 770.

HOMICIDE — Continued**§ 596 (NCI4th). Self-defense; manner of giving instructions; definitions of terms and use of particular words or phrases, generally**

The trial court erred in a second-degree murder prosecution when instructing the jury on perfect self-defense by stating that it must have appeared to defendant and he believed it to be necessary to kill the victim; submitting that element of perfect self-defense as stated reads into the defense an intent to kill, which is not part of second-degree murder, and renders impermissibly easier the State's burden of disproving the first element or the second element of perfect self-defense. **State v. Richardson**, 252.

§ 648 (NCI4th). Defense of places other than home; place of business

There was no prejudice in a prosecution for second-degree murder where the prosecutor repeated in closing arguments defense counsel's analogy comparing the right to defend a place of business to the right to defend one's home and the judge interrupted him because the judge's eventual charge to the jury that a person may stand his ground and has no duty to retreat from his place of business cleared up any confusion, real or inferred, allegedly caused by his interruption of the prosecutor. **State v. Richardson**, 252.

HOSPITALS AND MEDICAL FACILITIES OR INSTITUTIONS**§ 16 (NCI4th). Certificate of need; judicial review**

The superior court lacked jurisdiction to enter an order reversing the final decision of the DHR requiring petitioner to obtain a certificate of need prior to opening a new open-heart surgery facility. **Catawba Memorial Hospital v. N.C. Dept. of Human Resources**, 557.

HOUSING, AND HOUSING AUTHORITIES AND PROJECTS**§ 69 (NCI4th). Condominium unit owners' association**

Failure to record an amendment to plaintiff condominium association's bylaws in the office of the Register of Deeds within ten days of adoption as required by the bylaws voided the amendment. **Cornerstone Condominium Assn. v. O'Brien**, 527.

HUSBAND AND WIFE**§ 1 (NCI4th). Mutual rights and duties generally**

Commercial contract principles are not applicable to the marriage vows; the trial court in a divorce action properly dismissed a counterclaim based on breach of the obligations made at the marriage ceremony. **Poston v. Poston**, 849.

§ 5 (NCI4th). Right to claims for loss of consortium

The trial court properly dismissed plaintiff's claim in her individual capacity for loss of consortium based on the ground that the wrongful death statute encompasses loss of consortium claims since any common law claim encompassed by the wrongful death statute must be asserted by the personal representative for the deceased. **Keys v. Duke University**, 518.

INCOMPETENT PERSONS**§ 14 (NCI4th). Jurisdiction**

The clerk of superior court does not have authority to rehear an adjudication of incompetency based on the consent of the parties. **In re Ward**, 202.

INDICTMENT, INFORMATION, AND CRIMINAL PLEADINGS**§ 9 (NCI4th). Form and content, generally; signatures**

An indictment properly charged defendant with the offense of assault with a deadly weapon upon a law enforcement officer even if the caption of the indictment referred to the wrong statute. **State v. Allen**, 419.

§ 30 (NCI4th). Sufficiency of allegations of place

The trial court properly denied defendant's motion to quash an indictment for false pretenses because it failed to allege in the body thereof the county in which the alleged activities took place. **State v. Almond**, 137.

INDIGENT PERSONS**§ 19 (NCI4th). Expert witnesses generally; psychologists and psychiatrists**

Defendant failed to demonstrate the need for State funds to employ an independent psychologist and psychiatrist to assist in his defense. **State v. Allen**, 419.

INSURANCE**§ 509 (NCI4th). Uninsured motorist coverage generally**

The workers' compensation carrier for a plaintiff who was injured in an automobile accident while driving a truck within the course and scope of his employment had a subrogation lien on the UM policy proceeds in the case. **Bailey v. Nationwide Mutual Ins. Co.**, 47.

Defendant Nationwide's liability to plaintiffs for UM benefits could not be reduced by the amount of workers' compensation benefits paid to or for the benefit of plaintiff husband by Aetna, the workers' compensation carrier. **Ibid.**

Where plaintiffs' damages were established at an amount in excess of insurance available to plaintiffs under defendant insurer's UM policy, and plaintiffs were therefore entitled to the total policy amount, the issue of judgment interest did not apply. **Ibid.**

§ 511 (NCI4th). Uninsured motorist coverage; what must be shown to recover

Business and personal insurance policies issued by defendant to plaintiff did not provide uninsured or underinsured coverage for injuries sustained by plaintiff when the automobile in which he was a passenger was forced off the road by an unknown motorist where plaintiff was injured without making contact with the unknown motorist's vehicle. **Johnson v. N.C. Farm Bureau Ins. Co.**, 623.

§ 514 (NCI4th). Stacking uninsured motorist coverage

The language of plaintiffs' auto liability policy prohibited stacking of the UM coverages on the three separate vehicles covered by the policy. **Bailey v. Nationwide Mutual Ins. Co.**, 47.

§ 528 (NCI4th). Underinsured motorist coverage; extent of coverage

Plaintiff's recovery against a board of education pursuant to the Tort Claims Act for the death of a decedent who was struck by a school bus did not bar

INSURANCE — Continued

plaintiff's claims against the bus driver or decedent's UIM carrier for damages in excess of the maximum recovery allowable under the Tort Claims Act, but a stipulation by the board of education that plaintiff's damages were in excess of \$100,000 did not bind the bus driver or decedent's insurance carrier. **Oakley v. Thomas**, 130.

A Class II insured could not intrapolicy stack the UIM coverages for two vehicles listed in the owner's policy but could stack the UIM coverages for the two vehicles listed in his own policy. **Wiggins v. Nationwide Mutual Ins. Co.**, 26.

Plaintiff was entitled to recover costs and prejudgment interest from defendant UIM insurer. **Ibid.**

The tortfeasor's vehicle was not an underinsured vehicle where, at the time of the accident, the tortfeasor's liability coverage was identical to the plaintiffs' UIM coverage even though the tortfeasor's settlement with a passenger in his vehicle reduced the amount of liability coverage available to plaintiffs to less than that provided by their UIM coverage. **Ray v. Atlantic Casualty Ins. Co.**, 259.

The trial court did not err in granting plaintiff's motion for partial summary judgment allowing plaintiff to engage in intrapolicy stacking of the UIM coverage under his father's policy. **Miller v. Nationwide Mutual Ins. Co.**, 295.

§ 530 (NCI4th). Reduction of underinsured motorist insurer's liability

Defendant insurance company was not entitled to a credit under one UIM policy for payments made under another UIM policy. **Wiggins v. Nationwide Mutual Ins. Co.**, 26.

Defendant insurance company was not entitled to reduce its \$500,000 limit in UIM coverage by the workers' compensation benefits paid or to be paid to plaintiff by another insurance company. **Hieb v. St. Paul Fire & Marine Ins. Co.**, 502.

Defendant workers' compensation insurer was entitled to a lien against all amounts paid or to be paid to plaintiff by an underinsured motorist carrier. **Ibid.**

§ 532 (NCI4th). Underinsured motorist coverage; effect of policy provisions being in conflict with underinsured motorist statutes

Since G.S. 20-279.21(b)(4) required UIM limits to equal bodily injury liability limits, the applicable UIM coverage was \$100,000 rather than \$50,000 as the policy provided. **Wiggins v. Nationwide Mutual Ins. Co.**, 26.

§ 621 (NCI4th). Automobile liability insurance; method of cancellation; when effective

The trial court did not err in a declaratory judgment action to determine whether an insurance policy was in effect by granting summary judgment for the insurer where a check for a renewal premium was twice refused by the bank for insufficient funds, both refusals occurred after the expiration date, and defendant was in an accident after the expiration date. **Nationwide Mutual Ins. Co. v. Choice Floor Covering Co.**, 801.

§ 679 (NCI4th). Extent of insurer's authority to settle claims

The trial court did not err by granting summary judgment for plaintiff insurer in an action to recover a \$100,000 deductible where the policy explicitly granted to the plaintiff the right to settle a claim against the insured without the insured's consent, the settlement was for slightly more than the deductible, and defendant conceded that the settlement was reasonable. **Nationwide Mutual Ins. Co. v. Public Service Co. of N.C.**, 345.

INSURANCE — Continued

The trial court did not err by granting summary judgment for plaintiff insurer in an action to recover a deductible where defendant-insured counterclaimed for tortious interference with the fiduciary relationship with its attorney and breach of plaintiff's fiduciary duty to defendant. *Ibid*.

§ 680 (NCI4th). Effect of settlement in particular situations on rights of insured or person covered by policy

The trial court did not err by granting plaintiff insurer's motion for a summary judgment in an action to recover a \$100,000 deductible where defendant had argued that the plaintiff's failure to notify defendant of its intention to settle the suit had deprived plaintiff of its right to independent counsel and breached plaintiff's duty to defend but a letter from plaintiff put defendant on notice of the conflict inherent in deductible provisions and of defendant's right to an independent counsel. *Nationwide Mutual Ins. Co. v. Public Service Co. of N.C.*, 345.

§ 728 (NCI4th). Fire insurance; insurable interest in property generally

Plaintiff did not have an insurable interest in a house which was damaged by fire where she did not own the house, live in it, or otherwise possess it. *Vance v. Wiley T. Booth, Inc.*, 600.

§ 911 (NCI4th). Representations in application as preventing recovery

The Commissioner of Insurance did not err by failing to apply a "fraud" standard in voiding, ab initio, fire insurance coverage on petitioner's beach property since G.S. 58-3-10 requires only a false and material misrepresentation in order to avoid a policy. *In re Appeal by McCrary*, 161.

A fire insurance policy was properly voided ab initio where there was substantial evidence that petitioner made a false statement in the application that she resided at her beach house when in fact the house was uninhabitable. *Ibid*.

The Insurance Underwriting Association did not waive the right to full disclosure concerning occupancy of a beach cottage because it issued a policy of fire insurance on the cottage without physically inspecting the cottage. *Ibid*.

§ 1135 (NCI4th). Actions against insurer for negligence or bad faith in settlement

The trial court erred by dismissing a claim for bad faith refusal to settle an automobile insurance claim involving intrapolicy stacking where plaintiff alleged that defendant breached its duty of good faith in refusing, without reason, to pay plaintiff the full UIM coverage due under the policy and in refusing to effectuate a prompt, fair and equitable settlement of plaintiff's claim when liability was clear. *Miller v. Nationwide Mutual Ins. Co.*, 295.

JUDGMENTS

§ 38 (NCI4th). Propriety and effect of order signed and entered out of session where decision made during session

A supplemental judgment in an action under the New Motor Vehicles Warranty Act was vacated where the trial judge entered a supplemental judgment and there was no evidence that the session at which the original judgment had been entered was extended or that the parties consented to entry of the supplemental judgment beyond the session. *Buford v. General Motors Corp.*, 437.

JUDGMENTS — Continued

§ 354 (NCI4th). Applicability to interlocutory orders of rule regarding relief from judgments

The trial court properly denied plaintiffs' Rule 60(b) motion for relief from an order granting one defendant's motion to dismiss plaintiff's complaint where the order resolved less than all claims in the action and was not a final judgment. **Hooper v. Pizzagalli Construction Co.**, 400.

KIDNAPPING AND FELONIOUS RESTRAINT

§ 19 (NCI4th). Confinement for purpose of holding victim for ransom, or as hostage or shield

The evidence was sufficient to support defendant's conviction of second-degree kidnapping by removing the victim from one place to another for the purpose of using him as a shield. **State v. Allen**, 419.

LABOR AND EMPLOYMENT

§ 183 (NCI4th). Liability of contractee to employees of independent contractor; furnishing instrumentality

Defendant heating and air conditioning subcontractor was not liable for the death of a plumbing subcontractor's employee who fell from a scaffold on the ground that defendant breached a duty to the decedent as an invitee where there was evidence that the scaffold was owned by defendant but there was no evidence that defendant gave permission to decedent to use the scaffold or knowingly allowed its use by decedent. **Hooper v. Pizzagalli Construction Co.**, 400.

§ 184 (NCI4th). Liability of general contractor to employees of subcontractor

A general contractor could not be held liable for the death of a plumbing subcontractor's employee who fell from a scaffold on the ground that the general contractor breached a nondelegable duty of safety owed to decedent since the general contractor did not retain control of the manner and method by which the plumbing subcontractor performed its work, the plumbing work was not an inherently dangerous activity, and use of a scaffold to perform the plumbing work was totally collateral to the work as contracted. **Hooper v. Pizzagalli Construction Co.**, 400.

§ 190 (NCI4th). Inherently dangerous work generally

Plumbing work was not an inherently dangerous activity so as to subject a general contractor to liability for the death of a plumbing subcontractor's employee who fell from a scaffold. **Hooper v. Pizzagalli Construction Co.**, 400.

Plaintiffs' forecast of evidence was insufficient to show that defendant plumbing subcontractor engaged in conduct substantially certain to cause death or injury so as to give the superior court jurisdiction under *Woodson v. Rowland* of a claim for the death of an employee who fell from a makeshift scaffold owned by another subcontractor. *Ibid*.

§ 227 (NCI4th). Liability of employer for injuries to third persons; deviation or departure from employer's business for employee's own purposes

The trial court properly entered summary judgment for defendant car dealership on plaintiff's claim of respondeat superior based on evidence that a car salesman sexually assaulted plaintiff when he took her for a test drive of an automobile. **Stanley v. Brooks**, 609.

LABOR AND EMPLOYMENT — Continued**§ 235 (NCI4th). Actions against employer for injuries to third persons; summary judgment**

The trial court properly entered summary judgment for defendant car dealership on plaintiff's claim for negligent hiring of a salesman who sexually assaulted plaintiff where her forecast of evidence failed to show that defendant knew or reasonably could have known of the salesman's criminal history prior to the incident with plaintiff. **Stanley v. Brooks**, 609.

LANDLORD AND TENANT**§ 11 (NCI4th). Use and enjoyment of premises**

The trial court did not err in an action for breach of a lease by not submitting the issues of the landlord's alleged breaches of quiet enjoyment and the implied covenant of good faith and fair dealing. **IRT Property Co. v. Papagayo, Inc.**, 318.

§ 12 (NCI4th). Particular uses employed by tenant

The trial court did not err by denying a directed verdict for a tenant in a breach of lease action in which the tenant claimed that the landlord first breached the lease by changing the property from a shopping area to offices. **IRT Property Co. v. Papagayo, Inc.**, 318.

§ 89 (NCI4th). Landlord's action to recover rent; defenses; counterclaims

The trial court acted correctly in an action for breach of a lease by failing to instruct the jury that a material breach by the landlord would relieve the tenant's obligation under the lease to pay rent where the lease included language which clearly and unambiguously states that the tenant is under the obligation to pay monthly rent to the landlord regardless of any defense the tenant could assert. **IRT Property Co. v. Papagayo, Inc.**, 318.

The trial court did not err in an action arising from the breach of a lease by not instructing the jury on the requirement of good faith in exercising discretionary powers conferred under a contract where the record is void of any evidence that the landlord exercised its discretionary power to change the nature or use of the shopping center in bad faith. **Ibid.**

LIENS**§ 4 (NCI4th). Personal injury actions**

Plaintiff hospital authority was not entitled to a lien under G.S. 44-50 on settlement funds disbursed directly to the injured defendants who received medical care at plaintiff's facility since the statute applies only to funds paid to a third party. **Charlotte-Mecklenburg Hospital Auth. v. First of Ga. Ins. Co.**, 828.

§ 35 (NCI4th). Liens of mechanics, laborers, and materialmen dealing with other than owners; sufficiency of notice of claim of lien

A second tier subcontractor's notice of claim of lien failed to comply with statutory notice requirements where it was not titled in a manner which made it unmistakable that the lien was being claimed by way of subrogation or by a subcontractor, it failed to name the general contractor, and it failed to make specific reference to the relationships connecting the landowner, general contractor, subcontractor, and plaintiff. **Cameron & Barkley Co. v. American Insurance Co.**, 36.

MALICIOUS PROSECUTION**§ 17 (NCI4th). Sufficiency of evidence; nonsuit and directed verdict generally**

The trial court did not err by granting summary judgment for defendants on a malicious prosecution claim where plaintiff, an HIV positive patient at a state mental hospital, became upset and spat upon defendant Parker and a social worker accompanying him; Parker subsequently contacted the Butner police and plaintiff was arrested and indicted for assault with a deadly weapon with intent to kill; the charge of assault with a deadly weapon with intent to kill was dismissed; and plaintiff pleaded guilty to three charges of simple assault. Conviction of a lesser included offense of the charge initiated by the defendant is not a termination in the plaintiff's favor for purposes of a malicious prosecution claim. **Alt v. Parker**, 307.

The jury could infer malice from the lack of probable cause evidenced by the State's voluntary dismissal of a trespass charge against plaintiff. **Best v. Duke University**, 548.

MASTER AND SERVANT**§ 60.1 (NCI3d). Workers' compensation; injuries sustained while acting in interest of self**

The "bunkhouse" rule did not apply and plaintiff farm worker was therefore not entitled to workers' compensation benefits for injuries he sustained when he allegedly slipped on a piece of soap while exiting the shower at living facilities provided by the employer. **Jauregui v. Carolina Vegetables**, 593.

§ 68 (NCI3d). Workers' compensation; occupational diseases

The Industrial Commission properly found that plaintiff's spontaneous tear of the rotator cuff while operating a power sweeper constituted an occupational disease. **Gibbs v. Leggett and Platt, Inc.**, 103.

§ 69.1 (NCI3d). Meaning of "incapacity" and "disability"

The evidence was sufficient to support the Industrial Commission's conclusion that an illiterate, mildly retarded employee who suffered a lower back injury was permanently and totally disabled. **Gilliam v. Perdue Farms**, 535.

§ 77.1 (NCI3d). Modification and review of award; change of conditions or circumstances

Plaintiff did not experience a change of condition even though plaintiff had been given a disability rating of 15% shortly after his injury and another doctor gave him a 30% disability rating two years after his injury. **Crump v. Independence Nissan**, 587.

§ 87 (NCI3d). Claim under Compensation Act as precluding common-law action

Plaintiff's complaint failed to state a claim against defendant employer under *Woodson v. Rowland* where plaintiff alleged that he was injured by a co-worker's negligence, that the co-worker had previously engaged in a negligent act resulting in serious injury to another employee, and that defendant employer had retained the co-worker without retraining him or providing safety instructions to him. **Bynum v. Fredrickson Motor Express Corp.**, 125.

§ 94 (NCI3d). Findings of Commission; necessity for specific findings of fact

The full Industrial Commission failed to carry out its duties under G.S. 97-85 by not making its own findings of fact and conclusions to support its disposition of a workers' compensation claim. **Jauregui v. Carolina Vegetables**, 593.

MASTER AND SERVANT — Continued

The full Commission complied in substance with G.S. 97-85 in adopting the opinion and award of the Deputy Commissioner. **Crump v. Independence Nissan**, 587.

§ 94.3 (NCI3d). Rehearing and review by Commission

The Commission properly refused to set aside the original award and to grant plaintiff additional benefits under G.S. 97-30 where plaintiff entered into an agreement for compensation, accepted the benefits of the agreement, and did not contest the agreement until almost two years after entering it. **Crump v. Independence Nissan**, 587.

MORTGAGES AND DEEDS OF TRUST**§ 119 (NCI4th). Restriction of deficiency judgments respecting purchase-money mortgages and deeds of trust**

The trial court properly granted summary judgment for plaintiff in an action to collect the unpaid balance on an unsecured note given as partial payment for real property; the anti-deficiency statute does not act to bar an in personam action where the promissory note is unsecured. **Wilkinson v. SRW/Cary Associates**, 846.

§ 120 (NCI4th). Disposition of proceeds generally

A trustee who commenced but did not complete foreclosure was entitled to a partial commission computed under the deed of trust as five percent of the outstanding indebtedness. **In re Foreclosure of Newcomb**, 67.

Where the mortgagor defaulted on a note secured by a deed of trust, the trustee commenced but did not complete foreclosure, and the mortgagor satisfied the debt by selling the property at a private sale, that portion of the trial court's order determining that the mortgagor waived his right to contest payment of legal expenses and commission to the trustee by virtue of his signing a HUD-1 settlement form reflecting the payment of the legal fees was erroneous. **Ibid**.

MUNICIPAL CORPORATIONS**§ 45 (NCI4th). Resolution of notice of intent to consider annexation**

A resolution of intent and not a resolution of consideration initiates an annexation proceeding pursuant to G.S. 160A-48. **Asheville Industries, Inc. v. City of Asheville**, 713.

§ 59 (NCI4th). Annexation; tests in relation to use, size, and population; permissible margins of error in tests

The difference between a city's original figure that 64% of land to be annexed was comprised of lots and tracts five acres or less in size and the actual figure of 56.41% exceeded the statutorily permissible five percent margin of error. **Asheville Industries, Inc. v. City of Asheville**, 713.

§ 68 (NCI4th). Method of calculating under urban purposes test

An area sought to be annexed failed to meet the 60% minimum required under the subdivision test of G.S. 160A-48(c)(3). **Asheville Industries, Inc. v. City of Asheville**, 713.

§ 72 (NCI4th). Classification of property to be annexed; industrial or commercial

The trial court erred in finding that part of an area to be annexed was industrial in use where the only industrial development of the land was a .79-acre easement

MUNICIPAL CORPORATIONS — Continued

which contained high tension power lines supported by steel towers. **Asheville Industries, Inc. v. City of Asheville**, 713.

§ 74 (NCI4th). Classification of property to be annexed; single lots or tracts

The trial court erred in finding that a certain area to be annexed consisted of twenty separate lots where the lots all belonged to one person who had lived on the property since 1930, there were no improvements on the property except the owner's house and barn, only one road had been built on the property, and there had been no conveyances of lots. **Asheville Industries, Inc. v. City of Asheville**, 713.

§ 454 (NCI4th). Pleadings in relation to governmental immunity

Plaintiff alleged a claim against defendant only in his official capacity so that defendant shared a city's governmental immunity where plaintiff alleged that defendant was operating a fire truck in the course and scope of his employment as a city fireman when the accident between plaintiff and defendant occurred. **Taylor v. Ashburn**, 604.

NARCOTICS, CONTROLLED SUBSTANCES, AND PARAPHERNALIA**§ 155 (NCI4th). Sufficiency of evidence to support inference of possession of controlled substances generally**

The evidence was sufficient to support an inference of defendant's constructive possession of cocaine found on the seat of a pickup truck where defendant had been sitting. **State v. Hodge**, 462.

§ 196 (NCI4th). Instructions; lesser included offenses involving cocaine

No instructions on lesser included offenses was proper in a prosecution for trafficking in cocaine by possession of more than 200 but less than 400 grams where the tape of a conversation at defendant's home contained discussion of defendant's purchase of 250 grams of cocaine. **State v. Baker**, 410.

NEGLIGENCE**§ 6 (NCI4th). Negligent infliction of emotional distress**

Plaintiff's evidence was insufficient to support his claim for negligent infliction of emotional distress where it failed to show that a public safety officer who arrested plaintiff conducted himself differently from a reasonable person in the discharge of official duties of a like nature under like circumstances. **Best v. Duke University**, 548.

§ 19 (NCI4th). Factors to be considered on question of foreseeability of emotional distress arising from concern for another

Emotional distress suffered by parents who arrived at an accident scene shortly after their son was struck and killed by defendant's automobile was foreseeable by defendant. **Butz v. Holder**, 116.

§ 140 (NCI4th). Premises liability; notice or knowledge of condition; inspection

The trial court properly granted summary judgment for defendant in a negligence action arising from an injury suffered by plaintiff when she tripped over an umbrella protruding into an aisle from a display but plaintiff failed to show that defendant was on actual or constructive notice of the protrusion of the umbrella into the aisle. **Padgett v. J.C. Penney Co.**, 842.

PARENT AND CHILD**§ 25 (NCI4th). Award of custody to third persons; other relatives**

Grandparents do not have standing to seek custody or visitation of a child who has been placed in the custody of DSS after the child has been surrendered for adoption by one parent and the parental rights of the other parent have been terminated. **In re Swing v. Garrison**, 818.

§ 38 (NCI4th). Parental duty to support child; procedure for enforcement generally

The more specific provisions of Chapter 110 of the General Statutes dealing with the procedure for determining and enforcing support obligations of a father who voluntarily acknowledges paternity prevails over any conflicting procedure in Chapter 50 for determining and enforcing custody and support of minor children. **Wake County ex rel. Horton v. Ryles**, 754.

§ 43 (NCI4th). Parental duty to support child; summons; order or judgment

The defendant had sufficient notice of a child support hearing and the court properly entered an order against him where no complaint or summons was issued as required by Rules 3 and 4, but he had already signed an acknowledgment of paternity which met all of the requirements of G.S. 110-132(a) and the court complied with the requirements of G.S. 110-132(b). **Wake County ex rel. Horton v. Ryles**, 754.

§ 111 (NCI4th). Termination of parental rights; jurisdiction

The trial court erred by dismissing a termination of parental rights petition against a father who had insufficient minimum contacts with North Carolina to satisfy due process guarantees. A father's constitutional right to due process of law does not "spring full-blown from the biological connection between parent and child" but instead arises only where the father demonstrates a commitment to the responsibilities of parenthood. **In re Dixon**, 248.

§ 130 (NCI4th). Neglect; "neglected juvenile" defined

The trial court did not err in adjudicating that respondent's child, who was in a residential school program for the deaf, was a neglected juvenile. **In re Safriet**, 747.

PARTITION**§ 61 (NCI4th). Findings to support sale generally**

The trial court's order requiring the sale of two tracts held by the parties as tenants in common is reversed where the court failed to find that actual partition would result in one of the cotenants receiving a share with a value materially less than the value of the share he would receive were the property partitioned by sale. **Partin v. Dalton Property Assoc.**, 807.

PHYSICIANS, SURGEONS, AND OTHER HEALTH CARE PROFESSIONALS**§ 148 (NCI4th). Jury instructions; informed consent**

The trial court did not err in a medical malpractice action in which plaintiff alleged that defendant had prescribed a steroid without discussing possible side effects by instructing the jury, based on G.S. 90-21.13(a)(3), that plaintiff would have to prove that a reasonable person under all the surrounding circumstances would not have given consent. **Crawford v. Favez**, 328.

**PHYSICIANS, SURGEONS, AND OTHER
HEALTH CARE PROFESSIONALS — Continued**

§ 149 (NCI4th). Jury instructions; duty or standard of care

The trial court in a medical malpractice action properly refused to instruct the jury as to defendant's duty to exercise his best judgment in the treatment of plaintiff where there was no testimony tending to show that defendant breached such duty, and the court's instructions on the question of whether defendant exercised reasonable care and diligence in his treatment of plaintiff which used only the precise language of G.S. 90-21.12 were insufficient. **Bailey v. Jones**, 380.

PLEADINGS

§ 64 (NCI4th). Attorneys' fees as sanction; amount of award

The trial court did not err in awarding defendant \$15,000 in sanctions where plaintiff's complaint failed the legal and factual certification required by Rule 11, plaintiff initiated senseless litigation several times after the parties' separation, and plaintiff filed the complaint to harass defendant and increase the costs of litigation. **Brown v. Brown**, 614.

§ 289 (NCI4th). Counterclaim and crossclaim generally

The trial court was not at liberty to consider a counterclaim set forth in an affidavit. **First Citizens Bank & Trust Co. v. McLamb**, 645.

§ 303 (NCI4th). Compulsory counterclaims generally

Counterclaims were compulsory where defendant conceded that the claims arose from the same series of transactions as the original complaints. **House Healers Restorations, Inc. v. Wall**, 733.

§ 364 (NCI4th). Standard in determining motion to amend; discretion of court, generally

The trial court did not abuse its discretion by denying a motion to amend an answer to add compulsory counterclaims and additional parties where the non-movants would have been penalized with more discovery and litigation because the movant was initially acting pro se and its first attorney was dilatory. **House Healers Restorations, Inc. v. Wall**, 738.

§ 375 (NCI4th). Amended and supplemental pleadings; where opposing party was previously aware of information sought to be asserted by amendment; issue already before court

The trial court did not abuse its discretion in a legal malpractice action by allowing plaintiffs' motion to amend their pleadings where one of the new issues was sufficiently pled in the complaint and the others were tried by implied consent. **Smith v. Childs**, 672.

§ 384 (NCI4th). Relationship of amendment to motion to dismiss generally

Where the trial court denied plaintiffs' motion to set aside an order dismissing plaintiff's complaint, it could not allow plaintiffs' motion to amend their complaint. **Hooper v. Pizzagalli Construction Co.**, 400.

§ 401 (NCI4th). Evidence before court by consent of parties; issue tried by implied consent without objection

The issue of the statute of limitations was clearly before the trial court by implied consent, and the pleadings were deemed amended. **Miller v. Talton**, 484.

PLEADINGS — Continued

The trial court did not abuse its discretion in a legal malpractice action by allowing plaintiffs' motion to amend their pleadings where defendant impliedly consented to trial on most of the new issues by not objecting to the evidence as being outside the scope of the pleadings and the remaining new issue was sufficiently pled in the complaint. **Smith v. Childs**, 672.

PRINCIPAL AND SURETY**§ 3 (NCI4th). Liability of surety to creditor**

Although defendant guarantors in an action on notes contended that the bank had a duty to notify them that continuing guaranty agreements were in fact surety contracts, nothing in the record shows that the bank was attempting to deceive or mislead the defendants. **First Citizens Bank & Trust Co. v. McLamb**, 645.

PUBLIC OFFICERS AND EMPLOYEES**§ 35 (NCI4th). Public officers; civil liability generally; negligence**

Plaintiff's complaint did not state a claim against three DOT district engineers in their individual capacities for permitting foliage to obscure a stop sign and cause an accident. **Reid v. Roberts**, 222.

§ 42 (NCI4th). Employees subject to State personnel system

Petitioner did not become a permanent State employee by tacking two temporary appointments to her three and one-half month permanent position and therefore had no right to appeal her dismissal. **Cauthen v. N.C. Dept. of Human Resources**, 238.

§ 68 (NCI4th). Public employees; civil liability

Plaintiff's complaint failed to state a claim against DOT highway maintenance employees in their individual capacities for permitting foliage to obscure a stop sign and cause an accident. **Reid v. Roberts**, 222.

RAPE AND ALLIED OFFENSES**§ 86 (NCI4th). Time or date crime was committed**

Testimony by a minor child that the sexual acts committed by defendant occurred when she was in kindergarten was sufficient to establish the time frame during which the offenses occurred. **State v. Hammond**, 454.

§ 97 (NCI4th). First-degree rape; prosecution based on aiding and abetting; accessories and acting in concert

The evidence was insufficient to support defendant's convictions of first-degree rape and first-degree sexual offense because the State failed to prove that defendant was aided and abetted in the commission of the offenses by one or more persons as charged in the indictments, but the verdicts will be regarded as verdicts of guilty of second-degree rape and second-degree sexual offense. **State v. McClain**, 208.

§ 98 (NCI4th). Second-degree rape generally

The trial court did not err by denying defendant's motion to dismiss charges of second-degree rape and assault on a female based on insufficient evidence. **State v. Futrell**, 651.

RAPE AND ALLIED OFFENSES — Continued**§ 195 (NCI4th). Instructions on lesser offenses; attempt**

A statement by another participant in a gang rape that defendant "wasn't doing it right" was insufficient to raise a reasonable doubt as to whether defendant actually penetrated the victim so as to require an instruction on attempted rape. **State v. Brown**, 390.

§ 206 (NCI4th). Taking indecent liberties with children

The trial court did not err in a prosecution for first-degree sexual offense by not instructing the jury on taking indecent liberties with a minor because indecent liberties is not a lesser included offense of first-degree sexual offense. **State v. Ramseur**, 429.

RULES OF CIVIL PROCEDURE**§ 41.1 (NCI3d). Voluntary dismissal; dismissal without prejudice**

The trial court properly dismissed an action which had been filed within one year of a previous dismissal where the uncontroverted record reveals that plaintiff took his dismissal after he had rested his case, there is no evidence suggesting that a stipulation was entered into between plaintiff and defendant, there is no evidence that plaintiff obtained an order from the trial court allowing a dismissal under Rule 41(a)(2), and North Carolina has not embraced the federal option of allowing the court to treat a late notice of dismissal as a motion under Rule 41(a)(2). **Moore v. Pate**, 833.

SALES**§ 81 (NCI4th). Exclusion or modification of implied warranties of merchantability and fitness**

The trial court properly determined that the agreement between the parties for the lease of golf carts contained, by integration, the "Golf Car Proposal" and the "Equipment Lease Agreement," and there was no genuine issue of material fact regarding defendant's performance of its warranty obligations where the Equipment Lease Agreement disclaimed all warranties, including any warranties of merchantability and fitness. **Beau Rivage Plantation v. Melex USA**, 446.

SEARCHES AND SEIZURES**§ 26 (NCI4th). Exceptions to warrant requirements; requirement of probable cause**

An officer had probable cause to search defendant where a car in which defendant was a passenger fled at high speed from a residence known for drug trafficking, defendant acted suspiciously after the stop, and during a pat down for weapons, the officer felt a pebble in defendant's pocket which the officer believed to be crack cocaine. **State v. Whitted**, 640.

§ 58 (NCI4th). Reasonable belief that item is contraband or evidence of a crime

Cocaine seized from defendant was the fruit of a constitutionally impermissible search where an officer was justified in conducting a limited pat-down of defendant to determine whether defendant was armed and the officer discovered a rolled-up plastic baggie in defendant's pants pocket, but it was not immediately apparent to the officer that the baggie held contraband. **State v. Beveridge**, 688.

SEARCHES AND SEIZURES — Continued

An officer's seizure of cocaine from defendant was lawful where the officer felt the contraband in defendant's pocket while conducting a pat-down search for weapons, and the character of the substance was immediately apparent to the officer. **State v. Wilson**, 777.

§ 77 (NCI4th). Investigatory stops of motor vehicles generally

Officers' initial stop of defendant was not an unreasonable detention where defendant was stopped at a roadblock set up for the purpose of checking drivers' licenses and registrations. **State v. Sanders**, 477.

§ 82 (NCI4th). Stop and frisk procedures; reasonable suspicion that person may be armed

An officer's frisk of defendant at a driver's license check point was lawful where defendant was carrying no identification, defendant had no registration for the car, and the officer observed a bulge in defendant's pocket. **State v. Sanders**, 477.

An officer had reasonable suspicion to seize defendant and to perform a pat-down search for weapons where police received an anonymous phone call that individuals were dealing drugs at an apartment complex, and defendant and several others attempted to flee the scene when officers approached the area. **State v. Wilson**, 777.

§ 58 (NCI4th). Objects in plain view; reasonable belief that item is contraband or evidence of a crime

An officer properly frisked defendant where there was no evidence that the officer felt a packet of cocaine in defendant's pocket in a manner that invaded the privacy of defendant beyond a pat down for weapons, but his seizure of the packet of cocaine was unreasonable where the officer was never asked whether it was immediately apparent to him that the item he felt was contraband. **State v. Sanders**, 477.

STATE**§ 4.2 (NCI3d). Actions against the state; sovereign immunity; actions against officers of state**

The trial court did not err by granting summary judgment for defendants on a claim for deprivation of due process rights arising from his involuntary restraint while in a state mental hospital. **Alt v. Parker**, 307.

§ 8.1 (NCI3d). Contributory negligence of person injured

Plaintiff's husband was contributorily negligent in slipping and falling to his death over a waterfall in a state park where the husband was familiar with the area and should have been aware of the obvious dangers there. **Smith v. N.C. Dept. of Nat. Resources**, 739.

§ 8.2 (NCI3d). Particular tort claim actions

In an action to recover for the wrongful death of plaintiff's husband who slipped and fell to his death at a waterfall in a state park, the State did not negligently attempt to warn of the danger of the waterfall with an inadequate sign since the danger surrounding the waterfall which dropped 200 feet was obvious and apparent, and the sign was therefore adequate. **Smith v. N.C. Dept. of Nat. Resources**, 739.

STATE — Continued

§ 10 (NCI3d). Appeal and review of proceedings under Tort Claims Act

The full Industrial Commission did not err in adopting the decision of the Deputy Commissioner as its own without entering its own findings of fact and conclusions of law. **Smith v. N.C. Dept. of Nat. Resources**, 739.

TAXATION

§ 2.3 (NCI3d). Validity of particular classifications

The statute granting tax-exempt status to certain homes for the aged, sick, or infirm does not discriminate against persons who own their property for residential purposes in violation of the constitutional rule of uniformity of taxation or in violation of the equal protection clause of the N. C. Constitution. **In re Appeal of Barbour**, 368.

§ 19.1 (NCI3d). Construction of exemptions

The trial court erroneously determined that plaintiff's private label apple juice products do not require separate registration to be exempt from the excise tax on soft drinks under G.S. 105-113.47. **National Fruit Product Company v. Justus**, 495.

The court erred in ordering a refund of excise taxes plaintiff had paid on its vitamin C fortified apple juice products, sold under different product and brand names, because these are separate drinks and must be registered separately to qualify for the juice exemption to the soft-drink excise tax under G.S. 105-113.47. **Ibid.**

Plaintiff was not entitled to a refund of excise taxes paid prior to registration of an apple juice brand as exempt; until a drink is registered, it is taxable. **Ibid.**

§ 22.1 (NCI3d). Exemption from taxation; particular properties of religious, charitable, and educational institutions

Where the ACC requested a property tax exemption for its property used for the operation of its administrative offices, the Property Tax Commission did not err in finding that the property is owned by an educational institution, is of a kind commonly employed in activities incident to an educational institution, and is wholly and exclusively used for educational purposes, but the proceeding must be remanded for a determination as to whether the ACC is operated for profit and whether any person was entitled to receive any "pecuniary profit" except reasonable compensation. **In re Appeal of Atlantic Coast Conference**, 1.

§ 25 (NCI3d). Assessment and levy of ad valorem taxes generally; persons and property assessable

Where a taxpayer closed one of its textile manufacturing plants and sold the equipment and machinery, the equipment and machinery were not inventory held for sale in the regular course of business by a wholesale merchant and were thus not excluded from ad valorem taxation. **In re Appeal of Cone Mills Corp.**, 539.

§ 25.4 (NCI3d). Valuation and assessment

Where the parties entered into a computer lease agreement in which defendant agreed to pay taxes "imposed, assessed or payable" during the term of the lease, and the parties entered into an early termination agreement in June 1991 by which defendant agreed that its obligations under the lease would continue until performed in full, defendant was required to pay property taxes for 1991 even though the tax rate and the actual amount of tax were determined after the

TAXATION — Continued

date the lease was terminated. **Computer Sales International v. Forsyth Memorial Hospital**, 633.

• § 25.10 (NCI3d). **Proceedings; State Board of Assessment**

An order of the Property Tax Commission finding a county's assessment of NTI's business personal property null and void which was entered by Chairman Pinna on 4 November 1991 was itself null and void because Pinna's successor was appointed to the Commission by Governor Martin on 17 October and signed an oath of affirmation for the position on 1 November; thus, Pinna was no longer a member of the Commission when he entered the order. **In re Appeals of Northern Telecom**, 215.

TRESPASS

§ 2 (NCI3d). **Forcible trespass and trespass to the person**

Plaintiff's evidence was insufficient to support his claim for intentional infliction of emotional distress where it was based on conduct by officers in stopping and later arresting plaintiff. **Best v. Duke University**, 548.

The trial court did not err in a divorce action by dismissing a counterclaim for intentional infliction of emotional distress arising from adultery because the allegation of adultery does not constitute extreme and outrageous conduct. **Poston v. Poston**, 849.

TRIAL

§ 3.2 (NCI3d). **Motions for continuance; particular grounds**

The trial court did not abuse its discretion in denying respondent's request for a continuance of a hearing on the merits on 20 February as to whether her child was neglected where respondent's trailer burned down around 3 February and she did not contact her attorney from 6 January until 19 February. **In re Safriet**, 747.

UNFAIR COMPETITION

§ 1 (NCI3d). **Unfair trade practices in general**

The trial court did not err by awarding damages on an unfair or deceptive practices claim arising from the sale of a bulldozer. Although defendant contends that plaintiff established only a breach of contract, a breach of contract may violate G.S. 75-1.1 when accompanied by aggravating circumstances. **Garlock v. Henson**, 243.

The trial court correctly awarded attorney fees, and the case was remanded for award of a reasonable attorney fee for the appeal, in an unfair or deceptive practices action where defendant contended that the court did not make sufficient findings to support the award, but the court found that defendant willfully committed the acts charged and that there was an unwarranted refusal to settle. **Ibid**.

The trial court did not err in an action for breach of a lease by denying defendant's motion to amend its counterclaim to assert a claim under Chapter 75. **IRT Property Co. v. Papagayo, Inc.**, 318.

The trial court erred by dismissing under G.S. 1A-1, Rule 12(b)(6) an unfair or deceptive practices claim arising from an alleged bad faith refusal to settle an automobile insurance stacking claim. **Miller v. Nationwide Mutual Ins. Co.**, 295.

UNIFORM COMMERCIAL CODE

§ 12 (NCI3d). Implied warranties; merchantability

The agreement between the parties was a true lease of golf carts and not a disguised security agreement for the sale of goods, thus making implied warranty of fitness provisions of Art. 2 of the UCC inapplicable. **Beau Rivage Plantation v. Melex USA**, 446.

USURY

§ 1.1 (NCI3d). What constitutes usury; character of transaction

Late charges recoverable under the parties' Equipment Lease Agreement were not usurious interest prohibited by G.S. 24-10.1 since the provisions of Chapter 24 were inapplicable to a transaction involving a lease. **Beau Rivage Plantation v. Melex USA**, 446.

UTILITIES COMMISSION

§ 3 (NCI3d). Regulation of public utilities

The Utilities Commission's establishment of minimum filing requirements in a certificate of public convenience and necessity case involving an independent power producer did not constitute an unconstitutional exercise of legislative powers; the standard of public convenience and necessity and the policies of the State are sufficient to guide the Commission in deciding a CPCN case and the legislature's delegation of this authority is not unconstitutional. **State ex rel. Utilities Comm. v. Empire Power Co.**, 265.

Although an independent power producer contended that the Utilities Commission's deviation from the process prescribed by G.S. 62-82 and 62-110.1 constituted an unconstitutional exercise of the police power of the State, the licensing of independent power producers has a reasonable relation to the creation of a reliable and economical power supply and the avoidance of the costly overbuilding of generation resources and the regulating statute will not be strictly construed because the supply and sale of electricity to other utilities is not an ordinary trade or occupation. **Ibid.**

The Utilities Commission was not required by G.S. 62-82(a) to hold a hearing before dismissing a certificate of public convenience and necessity application; the Commission's authority is described by G.S. 62-60 as that of a court of general jurisdiction and the dismissal of the application here was, therefore, a proper exercise of its authority. **Ibid.**

§ 5 (NCI3d). Jurisdiction and authority of Commission in general

The certificate of public convenience and necessity process is sufficiently clear to avoid confusion even if the Utilities Commission finds authority from sections other than G.S. 62-82 and 62-110.1. **State ex rel. Utilities Comm. v. Empire Power Co.**, 265.

§ 15 (NCI3d). Regulation of electric companies

The language in G.S. 62-82 requiring automatic issuance of a certificate of public convenience and necessity by the Utilities Commission if the Commission had not ordered a hearing and had not received a complaint within ten days after the last publication of notice did not apply to petitioner, an independent power producer, because the Commission received complaints from Duke Power and CP&L. **State ex rel. Utilities Comm. v. Empire Power Co.**, 265.

UTILITIES COMMISSION — Continued

The Utilities Commission did not err by dismissing an application for a certificate of public convenience and necessity by an independent power producer where the forecast of evidence on the issue of need was inadequate. **Ibid.**

The Utilities Commission may resort to parts of Chapter 62 other than G.S. 62-82 and 62-110.1 (the CPCN sections) for the processing of applications; in so doing, however, the Commission may not, and did not here, deviate from the process which is stated clearly and unambiguously in G.S. 62-82 and 62-110.1. **Ibid.**

§ 51 (NCI3d). Judicial review, generally

Review of the Utilities Commission's decision to deny a certificate of public convenience and necessity to an independent power producer is governed by G.S. 62-94(b) (1989). **State ex rel. Utilities Comm. v. Empire Power Co.**, 265.

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Printed By
COMMERCIAL PRINTING COMPANY, INC.
Raleigh, North Carolina